777 Generally

Section 1 of the Fourteenth Amendment to the United States Constitution provides that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside, and it further provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. The essence of the Equal Protection Clause's command that no state shall deny to any person within its jurisdiction the equal protection of the laws is essentially a direction that all persons similarly situated should be treated alike.

778 Definition of "equal protection of the laws"; difficulty of definition

The phrase "equal protection of the laws" has never been precisely defined. In fact, the phrase is not susceptible of exact delimitation, nor can the boundaries of the protection afforded thereby be automatically or rigidly fixed. In other words, no rule as to what may be regarded as a denial of the equal protection of the laws which will cover every case has ever been formulated, and no test of the type of cases involving the Equal Protection Clause can be infallible or all-inclusive. Moreover, it would be impracticable and unwise to attempt to lay down any generalization covering the subject; each case must be decided as it arises. Thus, in maintaining the balance of constitutional grants and limitations, it is inevitable that the application of the equal protection guarantee should be defined in the gradual process of inclusion and exclusion. Nonetheless, and generally speaking, laws that apply evenhandedly to all unquestionably comply with the Equal Protection Clause. Furthermore, the Equal Protection Clause deals with invidiously discriminatory classifications, and there is no equal protection claim without some type of "classification" of an individual.

779 Particular judicially stated definitions

Although the courts have recognized the folly of attempting to delimit precisely the Equal Protection Clause, various broad and sweeping generalizations and statements as to the meaning of this supremely important part of the Federal Constitution have from time to time been enunciated. Many courts have repeatedly said that the guarantee of equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances, in their lives, liberty, and property, and in their pursuit of happiness.

Practice guide: In order to establish an equal protection claim, a plaintiff must first demonstrate that a property or liberty interest exists which has been taken away by the defendant's conduct. Bender v. City of St. Ann, 816 F. Supp. 1372 (E.D. Mo. 1993), judgment aff'd, 36 F.3d 57 (8th Cir. 1994), reh'g denied, (Nov. 16, 1994). The "equal protection of the laws is a pledge of the protection of equal laws." There is also authority to the effect that it means equality of opportunity to all in like circumstances. Denial of equal protection entails, at a minimum, a classification that treats individuals unequally. Equal protection of the laws means that the rights of all persons must rest upon the same rule under the same circumstances.

Observation: Discriminatory application of a facially neutral law offends the Constitution under the Equal Protection Clause.

780 Objectives of Equal Protection Clause regarding property

The Fourteenth Amendment undoubtedly intended not only that there should be no arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights, and that all persons should be equally entitled to pursue their happiness and acquire and enjoy property.

Practice guide: When the legislature attempts to impair a vested property right, notice and opportunity to respond, in order to comply with the Equal Protection Clause, must be reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections. The Fourteenth Amendment does not protect property from every injurious or oppressive action by a state.

It is not necessary to prove a deprivation of property to establish a violation of the Equal Protection Clause. Furthermore, the clause affords no protection from the consequences of competition arising from state activity.

781 Objectives of Equal Protection Clause regarding freedom from discrimination

The primary objective of the Fourteenth Amendment was to secure to those black persons, then recently emancipated, the full enjoyment of its freedom. It extends its protection, however, to all persons without regard to race, color, or class, and prohibits any state legislation which has the effect of denying to any race, class, or individual the equal protection of the laws. The Equal Protection Clause may thus be seen as the source of many civil rights.

782 Focus of Equal Protection Clause on individuals

At the heart of the Constitution's guarantee of equal protection lies the simple command that the government must treat citizens as individuals rather than as components of racial, religious, sexual, or national classes. Thus, a law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is

itself a denial of equal protection of the laws in the most literal sense. When a state distributes benefits to individuals unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause.

783 Nature and purpose of guarantee; in general

The guiding principle most often stated by the courts is that the constitutional guarantee of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.

Equal protection of the laws is something more than an abstract right; it is a command which the states must respect, the benefits of which every person may demand. Similarly, the laws to which the Fourteenth Amendment's guarantee of equal protection has reference do not relate to abstract units, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. Local tradition cannot justify a failure to comply with the constitutional mandate requiring equal protection of the law, and one must also be ever aware that the Federal Constitution forbids sophisticated as well as simple-minded modes of discrimination.

784 Requirement of similar treatment for those similarly situated

The Equal Protection Clause requires public bodies and institutions to treat similarly situated individuals in a similar manner, the Equal Protection Clause thus bars a governing body from applying a law dissimilarly to people who are similarly situated; however, treatment of dissimilarly situated persons in a dissimilar manner by the government does not violate the Equal Protection Clause. One facet of this requirement of similar treatment is that equal protection guarantees that a party will have the same amount of time to bring a tort action against the government as he or she would have to bring an action against a private tortfeasor. The purpose of the Equal Protection Clause is to secure every person within a state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution through the state's duly constituted agents. In other words, the concept of equal justice under the law requires a state to govern impartially, and it may not draw distinctions between individuals solely on differences that are irrelevant to a legitimate governmental objective; thus, for example, it may not subject men and women to disparate treatment when there is no substantial relation between the disparity and any important state purpose.

Equal protection in its guarantee of like treatment to all similarly situated permits classification which is reasonable and not arbitrary, and which is based upon material and substantial differences having a reasonable relation to the objects or persons dealt with and to the public purpose sought to be achieved by the legislation involved, inasmuch as the Equal Protection Clause does not forbid discrimination with respect to things that are different.

785 Prohibition of purposeful and intentional discrimination only

The Equal Protection Clause is violated only by purposeful and intentional discrimination. Mere governmental negligence is insufficient to sustain an equal protection claim, since such a claim also requires the presence of an unlawful intent to discriminate against a plaintiff for an invalid reason. The plaintiff need not prove that another fundamental right was trampled, as the right to equal protection of the laws is itself fundamental, nor need the plaintiff prove that he or she was victimized by a "suspect classification" such as race, but the discrimination must be intentional, and the government's motive must fail to comport with the requirements of equal protection.

786 Prohibition against invidious discrimination; avoidance of stereotypes

The equal protection guarantee is intended to secure equality of protection not only for all, but, as previously noted, against all similarly situated. Protection is not protection unless it accomplishes this. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted to be worked against, a larger class. One of the principal purposes of the Equal Protection Clause is to ensure that citizens are not subject to arbitrary and discriminatory state action. The Equal Protection Clause was intended to work nothing less than the abolition of all caste and invidious class-based legislation. It does not require that a state never distinguish between citizens, but only that the distinctions that are made should not be arbitrary or invidious. Thus, the test under the Equal Protection Clause is not whether a statute or rule discriminates, but is whether the difference in treatment is an invidious discrimination, not the mere possibility that there will be like or similar cases which will be treated more leniently; although, for purposes of equal protection, invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude than that intended, since discriminatory intent is not amenable to calibration. Still, absent a record of evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions. And a construction of the Equal Protection Clause which would find a violation of some federal right in every departure by state officers from state law is not favored.

Observation: Retaliation claims asserted by plaintiffs who allege that the government has unconstitutionally acted in retaliation to the assertion of rights by the plaintiffs do not arise under the Equal Protection Clause, as that clause does not establish any general right to be free from retaliation.

The Equal Protection Clause acknowledges that a shred of truth may be contained in some stereotypes, but it nonetheless requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize them as well as to perpetuate historical patterns of discrimination.

All classifications based on sex are not unconstitutional; the law recognizes that there are some real differences between men and women and permits different treatment that provides legitimate accommodation for those differences, but the law will not allow classifications based on fixed, archaic or stereotypical notions concerning the relative roles and abilities of females and males.

787 Equality of operation

Laws need not affect every man, woman, and child exactly alike in order to avoid the constitutional prohibition against inequality. Equality of operation of statutes does not mean indiscriminate operation on persons merely as such, but on persons according to their circumstances.

788 Embodiment of concept of equality of right

One of the principles on which this government was founded is that of equality of right, and this principle is emphasized in the Equal Protection Clause of the Fourteenth Amendment. The Constitution of the United States is no respecter of the financial status of persons, and rich and poor are to be accorded equal rights under it. Such equality before the law is also a fundamental principle of state constitutions. The equality of rights protected by a provision of a state constitution that government is instituted for the equal benefit, security, and protection of the people is the same as that preserved by the Fourteenth Amendment to the Federal Constitution. No legislative act is valid that is clearly obnoxious to the principle of equality of rights guaranteed by the Bill of Rights.

Observation: It is important to note that the Equal Protection Clause in the Fourteenth Amendment does not create any new or substantive legal rights or enlarge the general classification of rights of persons or things existing in any state under the laws thereof. It operates on them as it finds them established, and it declares, in substance, that in whatever form they are in each state, they should be held and enjoyed alike by all persons within its jurisdiction.

789 Relation to guarantee of due process; under the Fourteenth Amendment

The United States Supreme Court has pointed out the probable line of demarcation between the extent of the Due Process Clause and that of the Equal Protection Clause. The Court has indicated that although the Equal Protection Clause is associated in the Fourteenth Amendment with the Due Process Clause and that it is customary to consider them together, and although they may overlap and a violation of one may at times involve the violation of the other, the spheres of protection they offer are not coterminous. Under the Fourteenth Amendment, "due process" emphasizes fairness between the state and the individual dealing with the state, regardless of how other individuals in the same situation may be treated; "equal protection," on the other hand, emphasizes disparity in treatment by a state between classes of individuals whose situations are arguably indistinguishable. The requirement of due process tends to secure equality in that it demands a required minimum of protection of rights which is coupled with a spirit of equality in the operation of all governmental laws.

The framers and adopters of the Fourteenth Amendment, however, were not content to depend upon a mere minimum secured by the Due Process Clause, or upon the spirit of equality, which might not be insisted upon by local public opinion. They therefore embodied that spirit in a specific guarantee which extends beyond the requirements of due process. Yet the rights of life, liberty, and property, protected by the Due Process Clause of the Fourteenth Amendment, and the right to the equal protection of the law under the Fourteenth Amendment, grouped together, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. In cases involving a rationality review, a court must apply substantially the same analysis to both substantive due process and equal protection challenges.

Observation: "Rationality," for equal protection purposes, has a somewhat specialized meaning when governmental employment is at issue; it means more than that the employer must have a reason for its action. Backlund v. Hessen, 104 F.3d 1031, 12 I.E.R. Cas. (BNA) 753 (8th Cir. 1997), reh'g denied, (Feb. 13, 1997) and on remand to, 1997 WL 677726 (D. Minn. 1997). Equality of right is fundamental in both, and each forbids class legislation arbitrarily discriminating against some and favoring others in like circumstances.

790 Under the Fifth Amendment

The United States Supreme Court, by its application to congressional legislation of the same rules as to classification which are applied to determine the validity of state legislation under the Equal Protection Clause of the Fourteenth Amendment, has indicated that it often tests the validity of federal legislation under the Due Process Clause of the Fifth Amendment by the same rules of equality that are employed to test the validity of state legislation under the Fourteenth Amendment. For instance, for purposes of determining the validity, under the equal protection component of the Due Process Clause of the Federal Constitution's Fifth Amendment, of classifications based explicitly on race, all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny -- that is, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality. But where Congress, by its action, has neither invaded a substantive right of freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement for equal protection is that the congressional action be rationally related to a legitimate governmental interest.

While the Fifth Amendment contains no equal protection clause, it does forbid discrimination by the Federal Government that is so unjustifiable as to be violative of due process. The Due Process Clause of the Fifth Amendment assures every person the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike. The guarantee of equal protection under the Fifth Amendment is not a source of substantive rights or liberties, but is instead a right to be free from invidious discrimination in statutory classifications and other governmental activity. [n19] The federal sovereign, like the states, must govern impartially. In fact, the Supreme Court has said that central both to the idea of the rule of law and to the Constitution's guarantee of equal protection is the principle that the government and each of its parts remain open on impartial terms to all who seek its assistance. Thus, if a classification would be invalid under the Equal Protection Clause, it is also inconsistent with the due process requirement of the Fifth Amendment; conversely, if a classification is reasonable, rational, and not arbitrary, so that it would be valid under the Equal Protection Clause, it is also consistent with the Fifth Amendment's due process provision. Thus, in effect, the standards for analyzing equal protection claims under either the Fifth or Fourteenth Amendment are identical.

Practice guide: In conducting a rational-basis review under the equal protection component of the Fifth Amendment, a court presumes that the challenged laws are valid, placing a burden on the challenger to show that the laws are not rationally related to any legitimate government purpose.

In order to make out a disparate impact warranting further scrutiny of a federal statutory classification under the equal protection analysis of the Due Process Clause of the Fifth Amendment, it is necessary to show that the class which is purportedly discriminated against suffers from a significant deprivation of a benefit or the imposition of a substantial burden.

The concepts of "equal protection of laws" and "due process of law" are not mutually exclusive, both stemming from our American ideal of fairness. Still, it should not be implied that the two are always interchangeable phrases; although both amendments require the same type of analysis, the two protections are not always coextensive, since not only does their language differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual state. Since the Due Process Clause appears in both the Fifth and the Fourteenth Amendments, whereas the Equal Protection Clause does not, the primary office of the latter differs from, and is an additive to, the protection guaranteed by the former. The equal protection of the laws is a more explicit safeguard of prohibited unfairness than due process of law.

When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a state, Fifth Amendment due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest, and if the agency which promulgates that rule has direct responsibility for fostering or protecting such interest, it may reasonably be presumed that the asserted interest was the actual predicate for the rule.

The constitutional concept of equal protection of the laws means at the very least that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. On the other hand, when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause.

The national government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of the states with respect to the same subject matter.

791 Congress' power to enforce Equal Protection Clause

In accordance with the very terminology of the Fourteenth Amendment, Congress has the power by appropriate legislation to enforce the provision preventing any state from denying to any person within its jurisdiction the equal protection of the laws. The most important requirement for determining whether a statute is a valid exercise of Congress' power to enforce the Equal Protection Clause is whether the statute is consistent with the negative constraints of the Constitution, specifically the Constitution's protection of individual rights. It was not intended to bring within federal control everything done by a state or by its instrumentalities which is simply illegal under state laws, but only such acts by the states or their instrumentalities as are violative of rights secured by the Constitution of the United States. Congress may not authorize a state to violate the Equal Protection Clause. And the Equal Protection Clause is not a bludgeon with which Congress may compel a state to violate other provisions of the Constitution.

Congress, when acting pursuant to the enforcement clause of the Fourteenth Amendment, can prohibit or take measures designed to remedy unreasonable and arbitrary classifications made by the states, or the effects of such classifications, and when doing so can abrogate the states' sovereign immunity to suit in federal court. However, Congress' power to enforce the Fourteenth Amendment, in cases not involving suspect or quasi-suspect classes or fundamental interests, is limited to the elimination of arbitrariness or the effects of arbitrary government action, and does not permit Congress to prohibit or otherwise target reasonable state decisions or practices.

Observation: The enforcement clause of the Fourteenth Amendment does not permit Congress to prohibit every discrimination between groups of people, and thus every congressional action that enlarges the scope of a law to encompass a new class of people, thereby eliminating previous discrimination that the law had made, is not, ipso facto, a means toward enforcing the Fourteenth Amendment.

792 Proof of discriminatory intent, effect, and purpose

A person who claims an equal protection violation resulting from the unequal enforcement of a facially neutral statute must show both that the enforcement had a discriminatory effect, and that the enforcement was motivated by a discriminatory purpose. If a defendant challenging legislation as being racially discriminatory on equal protection grounds does not allege actual discriminatory intent, the deferential "rational basis" standard is used to review the challenged legislative scheme; if on the other hand the defendant alleges and demonstrates that the legislature passed the law with a discriminatory purpose, review is then conducted under the demanding "strict scrutiny" standard. The "rational basis" standard applies to equal protection challenges to a statute that discriminates on its face, but not to challenges based upon an allegedly discriminatory application of a facially neutral statute. To prevail on an equal protection claim based upon the application of a facially neutral statute, it must be established that: (1) the plaintiff was treated differently than similarly situated persons; and (2) the defendant unequally applied the statute for the purpose of discriminating against the plaintiff.

Practice guide: To establish a prima facie case of discrimination under the Equal Protection Clause, the plaintiff must demonstrate, inter alia, that he or she is otherwise similarly situated to members of an unprotected class, that he or she was treated differently from members of the unprotected class, and that the defendants acted with discriminatory intent. Factors probative of whether a decision-making body was motivated by discriminatory intent include evidence of a consistent pattern of actions by a decision-making body disparately impacting members of a particular class of persons; the historical background of the decision, which may take into account any history of discrimination by the decision-making body or jurisdiction it represents; the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and contemporary statements by decisionmakers on the record or in minutes of their meetings. However, discriminatory intent may be found even where the record contains no direct evidence of bad faith, ill will, or any evil motive on the part of public officials.

793 Who is bound; states

The Equal Protection Clause is a restriction on the state governments and operates exclusively upon them. However, as the Supreme Court and other courts have noted, the Equal Protection Clause allows the states considerable leeway to enact legislation that may appear to affect similarly situated people differently.

Observation: The guarantee of equal protection is not limited simply to measures instituted by the government, inasmuch as it also prevents the electorate as a whole, whether by referendum or otherwise, from instituting actions violative of the Equal Protection Clause.

Federal and state constitutional guarantees of equal protection require that the state governments treat similarly situated individuals in a similar manner. It does not preclude the states from enacting legislation that draws distinctions between different categories of people, but it does prohibit them from according different treatment to persons who have been placed by statute into different classes on the basis of criteria wholly unrelated to the purpose of the legislation.

No state may effectively abdicate its responsibilities under the Equal Protection Clause by either ignoring them or by merely failing to discharge them, whatever the motive may be. However, a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny in an equal protection case.

Imprecision in the terms of the Equal Protection Clause is necessary to cover a variety of individual-state relationships; no precise formula for recognition of state responsibility under the clause can be fashioned and applied. The existence of state action within the purview of the Equal Protection Clause can be determined only in the framework of the peculiar facts or circumstances of a case.

794 State agencies

The Equal Protection Clause is aimed at all official state actions, not just those of the state legislatures. The fact that a government board can only make recommendations and cannot enact any laws on its own does not immunize from equal protection scrutiny the validity of a state law requiring that parties appointed to the board be freeholders. The inhibitions of the Fourteenth Amendment include all the departments of state government, including the political and executive departments, and extends to all actions of a state denying equal protection of the laws, whatever the agency of the state taking the action or whatever the guise in which it is taken. In short, all governmental agencies authorized by the state, particularly municipal corporations and other political subdivisions, are within the purview of the clause.

795 State officials

Every state official, high and low, is bound by the Fourteenth Amendment. A case where one in possession of state power uses that power to accomplish the doing of wrongs which are forbidden by the Fourteenth Amendment is within the purview of that amendment, even though the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. Hence, the rights protected by the Equal Protection Clause may be improperly invaded by the acts of a state officer acting under color of state authority, even though he or she not only exceeded his or her authority, but also disregarded special commands of the state law. Whoever, by virtue of a public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition, and since this person acts in the name of the state and for the state and is clothed with the state's powers, his or her act is that of the state.

796 Counties and municipal corporations

Counties, municipal corporations, and other political subdivisions of a state are as bound by the Equal Protection Clause of the Fourteenth Amendment as are the states themselves.

Observation: While county action is generally state action for purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment. Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), reh'g denied, 416 U.S. 1000, 94 S. Ct. 2414, 40 L. Ed. 2d 777 (1974) and on remand to, 405 F. Supp. 802 (N.D. Ill. 1975), judgment rev'd on other grounds, 551 F.2d 152 (7th Cir. 1977), on reh'g, 563 F.2d 873 (7th Cir. 1977), cert. granted, 435 U.S. 904, 98 S. Ct. 1447, 55 L. Ed. 2d 494 (1978) and judgment aff'd, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979).

Observation: A city, as a governmental entity, can be treated differently for equal protection purposes than a private commercial entity.

797 Judicial branch of government

The judicial branches of the state governments are bound by the Equal Protection Clause of the Fourteenth Amendment, inasmuch as a constitutional mandate to maintain equality before the law and equal laws rests upon the judicial departments with as much force as upon the states' other departments. The action of state courts and of judicial officers in their official capacities, even though taken for the enforcement of private agreements, is state action within the meaning of the Equal Protection Clause. However, the Equal Protection Clause does not in any sense compel uniform decisions by state courts, and a mere error by a state judge is not a violation of the Equal Protection Clause.

798 United States and federal agencies

The Equal Protection Clause of the Fourteenth Amendment does not extend to authority exercised by the government of the United States. However, federal legislation may be, and is, tested under the Due Process Clause of the Fifth

Amendment by the same rules of equality that are employed to test the validity of state legislation under the Fourteenth Amendment's Equal Protection Clause.

Observation: The Equal Protection Clause does afford protection to employees who work for the Federal Government as well as to those who are served by them.

The Fourteenth Amendment is not applicable to the Virgin Islands or the District of Columbia; but the concepts of equal protection are inherent in the due process of law guaranteed to citizens of the District by the Fifth Amendment.

799 Private persons or entities

The commands of the Equal Protection Clause of the Fourteenth Amendment are addressed only to the states or to those acting under color of their authority. The Fourteenth Amendment itself erects no shield against merely private conduct, however discriminatory or wrongful. Private actions, no matter how egregious, cannot violate the equal protection guarantee of the United States Constitution.

Observation: Largely for this reason, one court has held that the power granted to Congress by the Fourteenth Amendment to enforce the Amendment by legislation did not empower Congress to enact 42 USCA ß 13981 (the Violence Against Women Act), a statute declaring that all persons within the United States have the right to be free from crimes of violence motivated by gender (as defined by the Act), and granting a federal civil cause of action to a person deprived of such right by any other person (including a person not acting under color of state law).

800 Private acts as governmental acts

Private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the state in any of its manifestations or actions has been found to have become entwined or involved in it.

Practice guide: The test to determine whether a constitutional deprivation caused by a private party involves "state action" is whether the claimed deprivation resulted from the exercise of a right or privilege having its source in state authority, and whether a private party charged with the deprivation can be described in all fairness as a state actor. In determining whether a particular action or course of action constitutes "state action," it is relevant to examine the extent to which the "private" actor relies on governmental assistance and benefits, whether he or she is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority.

The state involves itself significantly in private discriminatory activity so that a private actor is considered a state actor for purposes of Fourteenth Amendment liability where:

.there is a symbiotic relationship between the private actor and the state;

.the private discriminatory conduct is aggravated in some unique way by the involvement of governmental authority;

.the state has commanded or encouraged the private discriminatory action; and

.the private actor carries on a traditional state function.

Observation: The Supreme Court has aptly pointed out that the question of whether particular discriminatory conduct is private, on the one hand, or amounts to "state action," on the other hand, frequently admits of no easy answer. Moreover, the Court has concluded that no precise or infallible formula for such a determination exists, and has advised that only by sifting the facts and weighing the circumstances in each case can the state's nonobvious involvement in private conduct be determined. The crucial factor, however, is the interplay of the governmental and private actions.

In dealing with the question whether particular conduct is private or sufficiently involves governmental action so that the Fourteenth Amendment is applicable, the Supreme Court has indicated that although any kind of state action, including indirect or peripheral action, may constitute the requisite governmental action; nevertheless, the mere receipt of some sort of governmental benefit or service by a private entity does not necessarily subject it to the Equal Protection Clause. Where the impetus for discrimination is private, the state must significantly involve itself with the invidious discrimination in order for the discriminatory action to fall within the ambit of the constitutional prohibition in the Equal Protection Clause.

In regard to more specific matters which the Supreme Court has examined in resolving the private versus governmental conduct issue, the court has held that state enforcement of private policies of discrimination constitutes state action to

which the Fourteenth Amendment is applicable. Moreover, the Fourteenth Amendment may be applicable in situations where it is found that governmental policies or regulations encourage private discrimination or enable such discrimination to exist. And the Supreme Court has indicated that nominally private conduct which, through subterfuge, is actually governmental conduct, is subject to the Fourteenth Amendment.

The mere fact that a private entity is subject to state regulation does not make the Equal Protection Clause applicable, although the Supreme Court has held that the amendment is applicable to the acts of a political party in conducting its primary election where the state regulated primary elections.

801 Particular private activities as governmental acts

Private entities which are endowed with governmental powers and functions are subject to the constitutional limitations imposed upon the states. With regard to particular activities, courts have held that, under the circumstances, there was sufficient governmental involvement to make the Equal Protection Clause of the Fourteenth Amendment applicable in cases dealing with --

-- elections and political parties.

-- restaurants.

-- private educational institutions.

-- the sale or lease of realty.

-- judicial enforcement of racially restrictive covenants.

On the other hand, the Supreme Court held that, under the circumstances, there was insufficient governmental involvement in a case involving a private club. Finally, in some cases concerning parks and recreational facilities, the Court has held that there was sufficient governmental involvement to make the Fourteenth Amendment applicable, but has found insufficient involvement under other circumstances. In general, private discriminatory activities affecting civil rights are treated in greater detail in another article.

802 Who is protected; generally

The constitutional inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class from being singled out as a special subject of hostile or discriminatory legislation.

Caution: To sustain a claim of violation of equal protection, a plaintiff must ordinarily be singled out because of membership in a class and cannot just be the victim of random governmental incompetence.

The principal purpose of the Equal Protection Clause is to ensure that all citizens are not subject to arbitrary and discriminatory state action. It relates to individuals or persons -- "the least deserving as well as the most virtuous" -- but its protective scope goes much further, for it forbids the legislature to select any person, natural or artificial, upon whom it imposes discriminations not cast upon others similarly situated.

Caution: The Equal Protection Clause protects people, not places, so that a statute which discriminates between political subdivisions of state is not unconstitutional, as long as it treats similarly all persons who are similarly situated within the affected political subdivisions.

Observation: A class, for purposes of equal protection analysis, can consist of a single member. A class, for purposes of equal protection analysis, can also be defined by reference to the discrimination itself. While the principal target of the Equal Protection Clause is discrimination against members of vulnerable groups, the clause also protects "class-of-one" plaintiffs victimized by wholly arbitrary acts. Although a person can be a member of a class with only one member, he or she must be singled out because of his or her membership in the class and not be just the random victim of governmental incompetence; the state's act of singling out an individual for differential treatment does not itself create the class. 150/1

803 Specific individuals or classes

Although the Equal Protection Clause was adopted as a result of the Civil War in order to secure to the recently enfranchised former slaves equal rights and protection under the law, it applies to all persons and classes of persons within the territorial jurisdiction of each state, without regard to race, creed, color, sex, religion, or nationality. For example, the Equal Protection Clause does protect the rights of minority voters, but it also protects the rights of white majority voters as well. The following persons or groups of persons, inter alia, are protected by the Equal Protection Clause, but not all

such persons or groups are suspect classes entitled to the "strict scrutiny" analysis afforded to special categories protected, in varying degrees, by the Equal Protection Clause --

-- women.

-- children (including, in many situations, illegitimate children

Caution: States do have the right to impose reasonable parameters on suits to establish paternity. Therefore, neither application of the doctrine of res judicata to bar a child's paternity suit, nor statutes establishing a presumption that mothers adequately represent their children's interests in paternity proceedings violates the child's right to equal protection. Purcell v. Bellinger, 940 S.W.2d 599 (Tex. 1997). and juveniles, but not unborn children or juvenile delinquents).

-- Indians and other native Americans.

-- aliens (even illegal aliens).

-- citizens of territories or possessions of the United States.

-- prisoners.

-- felons.

But dogs have been held not to come within the protection of the guarantee.

Caution: Speaking a particular language, by itself, does not identify members of a suspect class. Furthermore, a state statute requiring that all instruction in subjects except foreign languages be done in English is not necessarily invidious since the policy of school authorities that it is in the best interest of all students to learn to function in English since our society is predominantly English-speaking is rationally based. Although the policy does have its main impact on students whose main language is Spanish, it is precisely these individuals who might benefit the most from such a rule. [n39]

804 Corporations and other business entities

Corporations are "persons" within the meaning of the Equal Protection Clause. And a contract between a cooperative association and each of its members is protected by the constitutional safeguards inhibiting laws denying equal protection.

805 States, counties, and municipal corporations

The Equal Protection Clause does not protect states. Thus, as a general rule, counties and municipal corporations, being creatures of the state, cannot invoke the Equal Protection Clause against an act of the state legislature.

806 Persons "within its jurisdiction"

Use of the phrase "within its jurisdiction" in the Equal Protection Clause does not detract from, but rather confirms, an understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of the state and reaches into every corner of a state's territory. The prohibition of the Equal Protection Clause manifestly relates only to the denial by the state of equal protection to persons "within its jurisdiction."

Observation: Children of military personnel or those whose parents reside on federal enclaves within a state are persons "residing within [a state's] jurisdiction" and are thus protected by the Fourteenth Amendment's equal protection clause.

Neither prior decisions nor the logic and history of the Fourteenth Amendment supports a construction of the Equal Protection Clause that would provide that persons who have entered the United States illegally are not "within the jurisdiction" of a state, even if they are present within the state's boundaries and subject to its laws. To permit a state to employ the phrase "within its jurisdiction" to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of any obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated into the Fourteenth Amendment. Thus, aliens are persons to whom the state cannot deny, while within its jurisdiction, the equal protection of the laws. A person, natural or artificial, who has acquired a large amount of property in a state by its authority and in compliance with its laws, who is subject to the jurisdiction of the courts of the state, has paid taxes upon his or her property, and who has been carrying on business in the state, is within its jurisdiction within the contemplation of the Equal Protection Clause. A person who goes into a state for the obviously lawful purpose of repossessing, by a permissible action in the courts of the state, specific personal property unlawfully taken out of his or her possession elsewhere and fraudulently carried into the state, is within its jurisdiction for all purposes of such undertaking.

A corporation not created in a state or doing business there under conditions that subject it to process issuing from the courts thereof at the instance of suitors is not, under the Equal Protection Clause, within the jurisdiction of that state. However, after domestication, a foreign corporation is entitled to equal protection with the state's own corporate progeny, at least to the extent that their property is entitled to an equally favorable ad valorem tax basis.

807 Remedies for discrimination and denial of equal protection

The United States Supreme Court has pointed out that the proper remedy for an unconstitutional exclusion from an opportunity or advantage based on discrimination should aim to eliminate, insofar as possible, the discriminatory effects of the past and to bar like discrimination in the future. The Court has also said that when the right invoked is that of equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by the withdrawal of benefits from the favored class as well as by the extension of benefits to the excluded class.

A legislature may confer a benefit upon the general public, thus satisfying equal protection, by creating a substitute remedy when it limits or abolishes an existing remedy.

808 Generally; rule permitting classification

Although the United States Supreme Court has frequently said that class legislation is obnoxious to the prohibitions of the Fourteenth Amendment, it has also held that the equal protection guarantee of the Fourteenth Amendment does not take from the states all power of classification. Ordinarily, classifications are to be set aside as violative of equal protection, the Court has said, only if they are based solely on reasons totally unrelated to the pursuit of the state's goals and only if no grounds can be conceived to justify them. The Equal Protection Clause provides a basis for challenging legislative classifications that treat one group of persons as inferior or superior to others, and for contending that general rules are being applied in an arbitrary or discriminatory way. While no bright line rule for determining the reasonableness of a statute under the Equal Protection Clause exists, a classification must be naturally and reasonably related to what it seeks to accomplish, and some reason to distinguish and prefer a particular individual or class must exist. Thus, the rule is well settled that a state may classify persons and objects for the purpose of legislation and pass laws applicable only to persons or objects within a designated class, for the purpose of obtaining revenue, applying the police power, strictly so-called, or increasing the industries of the state, developing its resources, or adding to its wealth and prosperity. As a matter of fact, as some of the courts have remarked, all legislation involves classification. Classification is an inherent right and power of the legislature, and the constitutional guarantee of equal protection does not dispense with all classification. A differentiation is not necessarily a discrimination. And since the very idea of classification is inequality, inequality in no manner determines the question of constitutionality.

It is class legislation, discriminating against some and favoring others, that is prohibited by the equal protection guarantee. The guarantee does not intend to take from the states the right and power to classify the subjects of legislation. It does not prohibit or prevent classification, provided such classification of persons and things is reasonable for the purpose of legislation, is not clearly arbitrary, is based on proper and justifiable distinctions, considering the purpose of the law, and is not a subterfuge to shield one class or unduly burden another or to oppress unlawfully in its administration. Rough accommodations made by the government in solving its problems do not violate the Equal Protection Clause unless the lines drawn are hostile or invidious. The Constitution does not require situations which are different in fact or opinion to be treated in law as though they were the same. However, the Equal Protection Clause does place a limit on government by classification, and when that limit is exceeded, the law is unconstitutional.

809 Legislative discretion and power

One of the basic principles involved in considering the validity of legislation assailed under the equality provisions of the federal and state constitutions is that in the exercise of its power to make classifications for the purpose of enacting laws over matters within its jurisdiction, the state is recognized as enjoying a wide range of discretion. With regard to equal protection claims, a legislature need not strike at all evils at the same time or in the same way; a legislature may implement its program step by step, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. The task of classifying persons for benefits inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration. Nonetheless, a statutory classification must advance legitimate legislative goals in a rational fashion in order to satisfy the requirements of equal protection. Therefore, whenever the power to regulate exists, the details of the legislation and the proper exceptions to be made rest primarily within the discretion of Congress and the state legislatures.

In the areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for such classification.

The legislative power to classify includes the power to subclassify within reason, although it is not a denial of equal protection for the legislature to fail to create subcategories. If the legislature has no authority to deal with the subject at which its measures are aimed, a classification, however logical, appropriate, or scientific, will not be sustained. If such authority does exist, a classification may be deficient in all these attributes, may be harsh and oppressive, and yet be within the power of the legislature.

810 Judicial review; generally

The relationship between the legislative and judicial departments of government in the determination of the validity of classification is well-settled and governed by the same general principles as those which control all phases of constitutional law. Thus, it is unquestionable that because the courts, in the last analysis, possess the power to determine the constitutionality of the acts of the various departments of government -- whether a classification of persons or objects for the purpose of legislative regulation or control is based upon substantial differences, or is arbitrary and consequently illegal is a judicial question reviewable by the courts. At the same time, the authorities state with unanimity that the question of classification is primarily for the legislature and that it can never become a judicial question except for the purpose of determining, in any given situation, whether the legislative action is clearly unreasonable. Where there are "plausible reasons" for Congress' action with regard to a statute which is subject to an equal protection challenge, a court's inquiry is at an end.

Stated another way, in assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification, keeping in mind that the validity of a broad legislative classification is not properly adjudged by focusing solely on that portion of the disfavored class that is affected most heartily by its terms. Review of legislative enactments by means of a rational basis analysis under the Equal Protection Clause must be a paradigm of judicial restraint, prohibiting a court from sitting as a super legislature to judge the wisdom or desirability of the legislative policy determinations underlying the legislation, and the legislative classification is subject to judicial revision only to the extent of seeing that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. In determining whether a statutory purpose is legitimate for purposes of equal protection analysis, substantial judicial deference is required so that a court does not substitute its value judgments for those established by the democratically chosen branch; that deference to the legislative will, however, must not lead to approval of a pernicious legislative purpose or one that does not comport with traditional notions of the proper role of government.

The leniency of a rational basis scrutiny under the Equal Protection Clause provides the political branches with flexibility to address problems incrementally and to engage in the delicate linedrawing process of legislation without undue interference from the judicial branch; it gives the legislative branch its rightful independence and allows the political branches of government to function properly. Under an equal protection analysis, the rational basis standard does not require that the state must necessarily choose the fairest or best means of advancing its goals.

Observation: In an equal protection analysis, the Supreme Court will assume that the objectives articulated by the legislature are the actual purposes of the statute, unless an examination of the circumstances forces it to conclude that they could not have been a goal of the legislation.

The Supreme Court has departed from traditional equal protection principles only when a challenged statute places burdens on suspect classes of persons or on a constitutional right that is deemed fundamental. Therefore, unless a classification is arbitrary and not founded on any substantial distinction or apparent natural reason which suggests the necessity or propriety of different legislation, a court has no right to interfere with the exercise of legislative discretion. A government whose statute is challenged on equal protection grounds is not compelled to verify logical assumptions with statistical evidence. But if a classification is clearly fanciful, capricious, arbitrary, or unnatural, it is, of course, the duty of the courts, in the event questions concerning constitutional equality are properly raised, to uphold constitutional rights and declare the statute invalid. In light of the purposes and history of a particular statute or an overall statutory scheme, a reviewing court may correct a discriminatory classification by invalidating the invidious exemption, and thus extending statutory benefits to those whom the legislature has unconstitutionally excluded. Great liberality has always been indulged in the matter of classification, at least in the traditional areas of economic or social legislation.

A wide variety of statutes, both civil and criminal, have been sustained by the courts as against the contention that such statutes denied the constitutional guarantee of equal protection of the laws.

811 Matters considered

In determining whether a classification, challenged as violating equal protection, is rationally related to a legitimate state purpose, the United States Supreme Court must answer: (1) whether the challenged legislation does have a legitimate purpose; and (2) whether it was reasonable for the state's lawmakers to believe that use of the challenged classification would promote that purpose. Violation of the Equal Protection Clause occurs only when, inter alia, a governmental action in question classifies or distinguishes between two or more relevant persons or groups. If the challenged governmental action does not appear to classify or distinguish between two or more relevant persons or groups, then the action, even if irrational, does not deny them equal protection of the laws. In determining whether or not a state law violates the Federal Equal Protection Clause, a court must consider the facts and circumstances of the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification. While the proper classification under a statute for purposes of equal protection analysis is not an exact science, scrutiny must begin with the statutory classification itself; but only when it is shown that the legislation has a substantial disparate impact on classes defined in a different fashion may analysis continue on the basis of the impact on those classes.

Under the Equal Protection Clause, a showing of disproportionate impact alone is not enough to establish a constitutional violation, because the mere existence of disparate treatment, even widely disparate treatment, does not furnish an adequate basis under the Equal Protection Clause for any inference that the discrimination was impermissibly motivated. Disparate treatment is not necessarily a denial of equal protection, since the states must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the state to remedy every ill. The courts must look to the effect, and not to the form, of the classification; and they should keep in mind that the validity of a broad legislative classification is not properly adjudged by focusing solely on that portion of the disfavored class that is affected most heartily by its terms.

A classification is proper so long as it is not a suspect one and there is a reasonable and proper basis therefor, regardless of what the motives and intent of the legislature were, since a legislative act may not be held violative of the Equal Protection Clause solely because of the motivations of the legislators who voted for it, or because the legislature was mistaken in its beliefs.

Practice guide: The standards by which the reasonableness of a statute's classification is to be measured are:

.all classifications must be based upon substantial distinctions which make one class really different from another;

.the classification adopted must be germane to the purpose of the law;

.the classification must not be based upon existing circumstances only and must not be so constituted as to preclude additions to the numbers included within a class;

.to whatever class a law may apply, it must apply equally to each member thereof; and

.the characteristics of each class could be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

In determining whether a basis of classification is reasonable, it must be considered from the standpoint of the legislature enacting it. And in testing state legislation against the equal protection guarantee, the court is not concerned with the soundness of the distinctions drawn, it being enough that it is open to the state to believe the distinctions to be valid as the basis of a policy for its people. Nor is the court concerned with the policy, wisdom, or expediency of the classification. The state's interests in convenience or expediency are not enough in themselves to form a substantial relationship between disparate treatment and the end sought to be achieved, for purposes of an equal protection analysis.

The Equal Protection Clause gives the federal courts no power to impose upon the states their views of what constitutes wise economic or social policy. And in reviewing the constitutionality under the Equal Protection Clause of a statutory classification, it is not the function of a court to hypothesize independently on the desirability or feasibility of any possible alternatives to the statutory scheme as formulated. A classification, though discriminatory, is not arbitrary or violative of the Equal Protection Clause if any state of facts reasonably can be conceived that would sustain it, or if the validity of the classification is fairly debatable.

A mere error in judgment on the part of the legislature is not sufficient to condemn a law as arbitrary.

Social and economic legislation that does not employ suspect classifications or impinge on fundamental rights -- i.e., those rights that are otherwise guaranteed in the Constitution -- must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose; moreover, such legislation carries with it a presumption of rationality that can be overcome only by a clear showing of arbitrariness and irrationality. On a rational basis equal protection challenge, the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it. Thus, the presumption of constitutionality of a legislative enactment is applicable to laws attacked as violating the equality requirements of the federal and state constitutions; and the presumption is in favor of the legislative classification, of the reasonableness and fairness of legislative action, and of legitimate grounds of distinction, if any such grounds exist, on which the legislature acted.

Caution: Where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of the classification must be sustained unless the classification rests on grounds wholly irrelevant to the achievement of any legitimate governmental objective; however, such presumption of constitutional validity disappears if the statutory classification is predicated on criteria that are, in a constitutional sense, "suspect."

Practice guide: Proof of discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. The challenger must convince the court that the legislative facts on which the classification is apparently based could not reasonably have been conceived to be true by the governmental decisionmaker. Thus, one who assails a statute on the ground that it involves a classification denying the equal protection of the laws must clearly establish the invalidity of such statute. Determining whether an invidious discriminatory purpose was a motivating factor in the legislature's passage of a law demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. Sometimes a clear pattern emerges from the effect of the state action even when the governing legislation appears neutral on its face.

812 Standards of review; generally

When a statute is subject to an equal protection challenge, the level of judicial scrutiny varies with the type of classification utilized and the nature of the right affected. Three degrees of scrutiny are applied by the courts in analyzing statutes challenged under the Equal Protection Clause:

.if a legislative classification disadvantages a "suspect class" or impinges upon the exercise of a "fundamental right," then the courts will employ strict scrutiny and the statute must fall unless the government can demonstrate that the classification has been precisely tailored to serve a compelling governmental interest;

.if the classification, while not facially invidious, nonetheless gives rise to recurring constitutional difficulties, it will be treated under intermediate scrutiny and the statutory classification must serve important governmental objectives and must be substantially related to the achievement of those objectives in order to withstand such scrutiny; and

.if neither strict nor intermediate scrutiny is appropriate, then the statute will be tested for mere rationality.

The first step in an equal protection analysis is determining which level of scrutiny to apply to a statute which distinguishes between classes of individuals.

813 Rational basis test

Governmental classifications that do not target suspect classes or groups or fundamental interests are subject only to the more deferential rational basis review. Legislation is presumed to be valid and will be sustained if the classification drawn by a statute is rationally related to a legitimate state interest. For example, legislation in the economic and social welfare area, such as Medicare, is tested under the deferential standard of equal protection review, under which a classification does not offend the Constitution, even if it is not made with mathematical nicety or in practice results in some inequality, if it has some "reasonable basis." Particularly in the area of economic and social regulation, restraint is exercised in the judicial review of legislative classifications under the Equal Protection Clause. Such legislation is invested with a presumption of constitutionality, and it is required merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state interest or purpose.

Under the "rational relation" test, where a state legislates within areas of its competence, and the legislation is nondiscriminatory on its face and as applied, and does not impinge upon the federal constitutional rights of any citizens, any classification created by the legislation survives scrutiny so long as the classification is rationally related to promoting a legitimate state interest and is reasonable. Under a rational basis review, a court will accept at face value contemporane-

ous declarations of governmental purposes, or in the absence thereof, rationales constructed after the fact, unless its examination of circumstances forces the court to conclude that they could not have been a goal of the classification.

Practice guide: The first step in determining whether legislation survives rational basis scrutiny under the Equal Protection Clause is identifying a legitimate government purpose which the enacting governmental body could have been pursuing. After identifying a legitimate governmental purpose, the second step of the rational basis scrutiny asks whether a rational basis exists for the enacting governmental body to believe that the legislation would further the hypothesized purpose. As long as reasons for the legislative classification may have been considered to be true, and the relationship between the classification and the goal is not so attenuated as to render the distinction arbitrary or irrational, the legislation survives the rational basis scrutiny.

For purposes of the rational basis standard of review under the Equal Protection Clause, the rule need not be the least restrictive means of achieving a permissible end, and so long as the state could rationally have decided that its action would further its goal, the Equal Protection Clause is satisfied. The rational basis review requires only that the classification be rational, but does not require that it be the fairest or best means that could have been used. Parties challenging legislation under the Equal Protection Clause cannot prevail so long as it is evident from all the considerations presented to the legislature, and those of which the court may take judicial notice, that the question is at least debatable.

This rational basis standard of analysis under the Equal Protection Clause is a relatively relaxed standard reflecting the court's awareness that the drawing of lines which creates distinctions is peculiarly a legislative task and an unavoidable one.

Practice guide: The Equal Protection Clause does not demand for purposes of a rational basis review that the legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its decision, but a court's review does require that a purpose may conceivably or may reasonably have been the purpose and policy of the relevant governmental decisionmaker. In fact, the Supreme Court has noted that because legislatures are not required to articulate their reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for a challenged distinction actually motivated the legislatures, and thus the absence of legislative facts explaining the distinction on the record has no significance on a rational basis review. The Court has further stated that, on a rational basis review, the legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data, and that a court is not to weigh conflicting evidence as to whether an act will succeed in effectuating the legislature's stated goals.

If a statute does not burden a suspect group or fundamental interest in distinguishing between classes, the courts are quite reluctant to overturn the statute on the ground that it denies equal protection of the laws, and a court will not overturn such a statute, even when it thinks the statute is improvident or unwise, unless the varied treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the legislature's actions were irrational.

814 Intermediate scrutiny test

"Intermediate scrutiny," wherein a challenged classification need only further a substantial state interest, is employed only in limited circumstances when legislation is not facially or constitutionally invidious, but nonetheless gives rise to some recurring constitutional difficulties. In the case of sex or gender discrimination, or illegitimacy, for instance, the proper standard to apply is the intermediate scrutiny standard. Thus, a lower court's order requiring a university to comply with Title IX by accommodating fully and effectively the athletic interests and abilities of its women students should be reviewed under the intermediate scrutiny test for determining an equal protection violation.

To withstand intermediate scrutiny under an equal protection analysis, a statutory classification must be substantially related to an important governmental objective.

Caution: The rule, formerly followed by the United States Supreme Court when analyzing so-called "benign" race or sex discrimination against white persons in favor of minorities, that called for examination of such cases under the intermediate scrutiny standard has been rejected by the Court.

815 Strict scrutiny test

Whenever a state law infringes upon a constitutionally protected right, the United States Supreme Court undertakes an intensified and strict equal protection scrutiny of that law. Thus, classifications which are suspect (such as those based on race), or aimed at fundamental interests, such as freedom of speech, must pass the strict scrutiny test to survive an equal protection challenge. In the case of legislation involving suspect classifications or touching on fundamental inter-

ests, judicial review under the Equal Protection Clause requires an active and critical analysis. Under the strict standard applied in such cases, the state bears the additional burden of establishing that it has a compelling interest that justifies the law, and that the law or ordinance is narrowly tailored such that there are no less restrictive means available to effectuate the desired end.

Observation: Under the Equal Protection Clause of the Federal Constitution's Fourteenth Amendment, an interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who have truly suffered the efforts of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.

Application of the more rigorous "strict scrutiny" test of a classification affecting a protected class is properly invoked only where the plaintiff can show intentional discrimination by the government.

The searching review that is the hallmark of a strict scrutiny equal protection review is appropriate only in limited cases, in which a statute classifies along inherently suspect lines or burdens the exercise of a fundamental constitutional right. Discrimination is not shown merely because a state legislature has chosen not to subsidize the exercise of a fundamental right, and the strict scrutiny test does not apply in such situations. The state bears a heavy burden of justification, and such statutes will be closely scrutinized in light of their asserted purposes.

816 What rights are fundamental

"Fundamental rights," infringement of which is subject to heightened and strict scrutiny under the Equal Protection Clause, include only those basic liberties explicitly or implicitly guaranteed by Federal Constitution. Statutes affecting fundamental constitutional rights must be drawn with precision and must be tailored to serve their legitimate objectives; if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state must not choose the way of greater interference, but must choose the less drastic means.

In determining whether a particular state law impinges on a fundamental right or interest so as to be subject to strict judicial scrutiny under the Equal Protection Clause, the United States Supreme Court does not pick out particular human activities, characterize them as "fundamental," and give them added protection but, to the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands. Thus, under the Equal Protection Clause, any suspect classification which serves to penalize the exercise of a constitutional right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional, although it is not the province of the United States Supreme Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. The social importance of the right or interest involved is not the critical determinant for subjecting legislation to strict judicial scrutiny under the Equal Protection Clause, although, for equal protection purposes, the Supreme Court will not ignore the significant social costs borne by our nation when select groups are denied the means to absorb the values and skills upon which our social order rests. Similarly, the importance of a service performed by the state does not determine whether it must be regarded as fundamental for purposes of strict judicial examination under the Equal Protection Clause.

Fundamental interests that must be protected by the stricter standards of reviewing classifications include --

-- the right of procreation.

-- the right to marry.

-- the right to exercise First Amendment freedoms such as free speech, political expression, press, assembly, and so forth.

-- the right to interstate travel.

-- the right to pursue a lawful business or occupation.

-- the right to vote.

But the right to an education has been held not to be among the rights afforded explicit or implicit protection under the United States Constitution. Similarly, there is no fundamental right to a certain quality of housing. And there is no constitutional fundamental right of governmental employment per se. Neither jury service nor participation in interscholastic athletics is a fundamental right. And bankruptcy is not akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment, which the United States Supreme Court has come to regard as fundamental and which demand the lofty requirement of a compelling governmental interest before they may be signifi-

cantly regulated, nor does bankruptcy touch upon what have been said to be the suspect criteria of race, nationality, or alienage; instead, bankruptcy legislation is in the area of economics and social welfare, and the applicable standard, in measuring the propriety, for purposes of equal protection, of Congress' classification, is that of rational justification.

817 What classes are strictly suspect

In determining whether a class is strictly suspect, and thus is entitled to have applied to it the strict scrutiny test, a court traditionally looks for an indication that the class is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness, as to command extraordinary protection from the majoritarian political process. The underlying rationale of the "suspect classification" theory is that where legislation affects discrete and insular minorities, the presumption of constitutionality fades because traditional political processes may have broken down. Judicial decisions have rejected administrative ease and convenience as sufficiently important objectives to justify suspect classifications.

Suspect classifications deserving of strict scrutiny include those based on race or national origin, religion, alienage, nonresidency (at least in some instances), and wealth, although the United States Supreme Court has never invoked the stricter standard for reviewing classifications based on wealth unless such classifications deprived persons of fundamental rights.

Sex and illegitimacy are suspect classifications, but a majority of the justices of the Supreme Court has never clearly determined that legislation affecting these classes should be analyzed under the strict scrutiny test. These classes are instead currently being analyzed under the intermediate scrutiny test.

Classes consisting of handicapped or disabled children, or indigent women desiring abortions, as such, have been held not to constitute "suspect classifications." Parents of unborn children do not constitute a suspect class, nor do single parents of minor children. Indigents in general do not compose a suspect class, and no fundamental right to public assistance exists under the Constitution; however, legislation which has a disparate impact on indigent defendants should be subject to a more searching scrutiny than requiring a mere rational relationship. Casino dealers, strikers, and condominium owners are not suspect classes for purposes of equal protection analysis, nor are state employees a suspect class. A state no-fault insurance law does not involve any suspect classification, and a statute enhancing the penalty for murder of a peace officer has been held not to create a suspect classification. Furthermore, various laws or benefits dealing with classifications based on pregnancy, criminal records, [n17] status as veterans, population or geographical area or size, conscientious objection, homosexuality, and age have all been held subject only to the rational relationship rather than to the strict scrutiny test.

Observation: Courts rarely have sustained legislation subjected to the "strict scrutiny" standard of review, while few statutes have failed to satisfy the traditional equal protection test of rationality.

818 Reasonableness

The Equal Protection Clause does not forbid classification; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. Thus, the mere fact of classification is not sufficient to relieve a statute from the reach of the Equal Protection Clause. One of the essential requirements as to classification, in order that it may not violate the constitutional guarantee as to equal protection of the laws, is that the classification must not be capricious or arbitrary, but must be reasonable and natural, and must have a rational basis, in the light of its purpose or objective. For instance, a statute providing a limitations period for causes against estates which is shorter than the general limitations period is a rational means of achieving a legitimate government interest in finality as to claims against estates, and thus does not deny equal protection. If a legislative classification or distinction neither burdens a fundamental right nor targets a suspect class, the United States Supreme Court will uphold it against an equal protection challenge so long as it bears a rational relation to some legitimate end. The Equal Protection Clause requires that a classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Observation: It is frequently difficult to determine whether a particular classification is reasonable or unreasonable, and no definite rule has or can be laid down whereby this may be determined. The determination must be made in accordance with the facts presented by each particular case. The test of reasonableness of a legislative classification is the good faith of the legislature making it. Discrimination of an unusual character especially suggests careful consideration to determine whether it is obnoxious to the constitutional provision. Under the traditional standard of judicial review, a statutory classification must bear some rational relationship to a legitimate state interest, and the latitude given state

economic and social regulation is necessarily broad; however, when state statutory classifications approach sensitive and fundamental rights, the courts will exercise a strict scrutiny for equal protection purposes.

819 Prohibition of legislation which is arbitrary, capricious, and the like

Corollary to the rule that a legislative classification must be reasonable if it is to comport with the equal protection guarantee is the firmly established principle that a classification which is arbitrary or capricious fatally conflicts with that guarantee. A classification must be reasonable, not arbitrary. Arbitrary and irrational discrimination violates the Equal Protection Clause even under the Supreme Court's most deferential standard of review. Legislative classification may not be employed as a subterfuge to shield one class or unduly to burden another or to oppress unlawfully in its administration. Any discrimination is invalid if it is purely arbitrary, oppressive, or capricious, and made to depend on differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no proper connection with the object sought by the legislation. But the fact that a statute discriminates in favor of certain classes does not make it arbitrary if the discrimination is founded upon a reasonable distinction, or if any state of facts reasonably can be conceived to sustain it. The Equal Protection Clause is offended only if the statute's classification rests on grounds wholly irrelevant to the achievement of the state's objective.

Observation: The Commerce Clause, unlike the Equal Protection Clause, is integrally concerned with whether a state purpose implicates local or national interests; the Equal Protection Clause, in contrast, is concerned with whether a state purpose is permissibly discriminatory, and thus whether such discrimination involves a local or other interest is not central to the inquiry to be made.

820 Material and substantial differences in regulated and unregulated classes

The Fourteenth Amendment, in requiring equal protection of the laws, is not to be construed as introducing a factitious equality without regard to the practical differences that are best met by corresponding differences of treatment. The Supreme Court has held that, generally speaking, it is competent for a legislature to determine upon what differences a distinction may be made for the purpose of statutory classification between objects otherwise having resemblances, although, of course, such power cannot be exercised arbitrarily and the distinction made must have some reasonable basis. The general rule is well settled that a classification, to be valid, must rest upon material differences between the persons, activities, or things included in it and those excluded; furthermore, it must be based upon substantial distinctions. It is only when such distinctions exist as differentiate, in important particulars, persons or classes of persons from the body of the people that laws having operation only upon such particular persons or classes of persons are upheld as valid enactments. As the rule has sometimes been stated, the classification must, in order to avoid the constitutional prohibition, be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones. The legislature cannot take what might be termed "a natural class of persons," split that class in two, and then arbitrarily designate the dissevered factions of the original unit as two classes and thereupon enact different rules for the government of each. By the same token, while a statutory discrimination between two like classes cannot be rationalized by assigning different labels to them, neither can two unlike classes be made indistinguishable by attaching a common label to them. Any law that is made applicable to one class of citizens only must be based on some substantial difference between the situation of that class and other individuals to which it does not apply, and must rest on some reason on which it can be defended.

The reason for a classification must inhere in the subject matter, must be natural and substantial, and must be one suggested by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them. However, the difference between the subjects of a legislative classification need not be great, and if any reasonable distinction between the subjects as a basis for the classification can be found, the classification should be sustained; a "narrow" distinction will suffice. A common characteristic shared by beneficiaries and nonbeneficiaries alike is not sufficient to invalidate a statute as violative of equal protection requirements, when other characteristics peculiar to only one group rationally explain the statute's discriminatory treatment of the two groups.

821 Relationship between differences and objectives of classification

The standard by which the sufficiency of those differences which form a valid basis for classification may be measured has been repeatedly stated by the courts in many formulas which vary slightly in detail, but which nonetheless contain substantially the same elements. The objects and purposes of a law present the touchstone for determining proper and improper classifications, and a classification to be valid must always rest on a difference which bears a fair, substantial, natural, reasonable, and just relationship to the object for which it is proposed. The classification must be based upon proper and justifiable distinctions, considering the purpose of the law. A classification must be based on substantial distinctions which make real differences and are germane and pertinent to the purposes of the law, and while the legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, the classification must rest upon real differences of situation and circumstances surrounding the members of the

class, relative to the subject of legislation, which render appropriate its enactment. Where the reason for a classification inheres in the subject matter and the classification is natural and substantial and bears a reasonable relationship to the evil sought to be controlled, it is valid. But where the class singled out by the legislature in a statute has no necessary connection with the evil sought to be prevented, and where that evil can be directly prevented through nondiscriminatory legislation, the statute must be struck down as an invidious discrimination against that class.

Although the Equal Protection Clause does not deny to states the power to treat different classes of persons in different ways, nevertheless the Equal Protection Clause denies to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.

822 Application of law to all members of regulated class

A fundamental principle involved in classification is that it must meet the requirement that a law shall affect alike all persons in the same class and under similar conditions. Generally, laws that apply evenhandedly to all unquestionably comply with the Equal Protection Clause. If a classification in legislation meets the prerequisites indispensable to the establishment of a class that it be reasonable and not arbitrary, and be based upon substantial distinctions with a proper relation to the objects classified and the purposes sought to be achieved, as long as the law operates alike on all members of the class, which includes all persons and property similarly situated, it is not subject to any objections that it is special or class legislation, and is not a violation of the federal guarantee of the equal protection of the laws.

The Equal Protection Clause does not preclude a legislative classification made for the purpose of applying a statute, not to the group classified, but to everyone except that group. The generality of an act does not depend on the number within the class it purports to regulate, or the number without that class; it is general and not unconstitutional when it applies uniform rules of conduct for all those coming within the scope of its application, and it may not be challenged for denial of equal protection to those on whom it operates because others differently situated may not be affected by its terms. Nor is equal protection denied merely because, at one time one individual is not included within the class regulated, while at another time another individual similarly situated is included within that class, where there is no discrimination among persons in a similar situation at any given period.

There must always be uniformity within the class. If persons under the same circumstances and conditions are treated differently, there is arbitrary discrimination, and not classification. The Fourteenth Amendment does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate, but merely requires that all persons subjected to such legislation shall be treated alike, under similar circumstances and conditions, both in the privileges conferred and in the liabilities imposed.

823 Completeness of inclusion of members

In order for a classification to meet the requirements of constitutionality, it must include or embrace all persons who naturally belong to the class. However, a regulation challenged under the Equal Protection Clause is not devoid of a rational predicate simply because it happens to be incomplete. The Equal Protection Clause does not require the state to grant all constitutionally permissible exemptions from a general statutory scheme merely because it has chosen to grant one such exception. Such a classification must not be based on existing circumstances only, or so constituted as to preclude additions to the number included within a class, but must be of such a nature as to embrace all those who may thereafter be in similar circumstances and conditions. Furthermore, all who are in situations and circumstances which are relative to the subjects of the discriminatory legislation and which are indistinguishable from those of the members of the class must be brought under the influence of the law and treated by it in the same way as are the members of the class.

824 Exactness

In a classification for governmental purposes there usually cannot be an exact exclusion or inclusion of persons and things. The constitutional command for a state to afford equal protection of the law sets a goal that is ordinarily not attainable by the invention and application of a precise formula. Classification is not an exact science.

It is well settled that a classification having some reasonable basis does not offend against the Federal Constitution merely because it is not made with mathematical nicety or because in practice it results in some inequality. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. For instance, in levying taxes, a state is not required to resort to close distinctions or to maintain precise, scientific uniformity with reference to composition, use, or value; to hold otherwise would be to subject the essential taxing power of the state to intolerable supervision, hostile to the basic

principles of our government, and wholly beyond any protection which the general clause of the Fourteenth Amendment was intended to secure. As another example, under the Equal Protection Clause, a state must make an honest and good faith effort to construct its legislative districts as nearly of equal population as is practicable, but since absolute equality is a practical impossibility, mathematical exactness or precision is not a constitutional requirement. Abstract symmetry and perfection are not required. What satisfies the rule of equality has not been and probably never can be precisely defined. The principle of equality, therefore, necessarily permits many practical inequalities, and classification is not invalid because it does not depend on scientific or marked differences in things or persons or in their relations. The Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of the Constitution.

It is not essential that there be a logical appropriateness of the inclusion or exclusion of objects or persons involved in a classification. The existence of the power of classification to suppress an evil is not to be denied simply because some innocent articles or transactions may be found within the proscribed class.

For purposes of equal protection there is no constitutional requirement that a statutory provision filter out those, and only those, who are in the factual position which generated the concern reflected in the statute. And the Supreme Court has said that a conspicuous pattern of discrimination is not a necessary predicate to a violation of the Equal Protection Clause.

825 Completeness of regulation of evils

The Federal Constitution does not require that state laws must cover the entire field of proper legislation in a single enactment. Legislation is not unconstitutional merely because it is not all-embracing and does not include all the evils within its reach. Without violating the Equal Protection Clause, a legislature may implement its program step-by-step in the field of economic regulation, and may adopt regulations that only partially ameliorate a perceived evil. It may defer complete elimination of the evil to future regulations. It may "proceed cautiously, step by step," and "if an evil is specially experienced in a particular branch of business," it is not necessary that the prohibition "should be couched in all-embracing terms." There is no constitutional requirement that regulation must reach every class to which it might be applied, or that the legislature must regulate all or none. Mere underinclusiveness is not fatal to the validity of a law under the Equal Protection Clause, even if the law disadvantages an individual or identifiable members of a group. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. If the class discriminated against is, or reasonably might be, considered to define those from whom the evil is to be feared, it may properly be picked out.

826 Gender discrimination under Federal Constitution; in general

The Equal Protection Clause of the United States Constitution's Fourteenth Amendment prohibits the states from denying to any person the equal protection of the laws; and this has been interpreted as prohibiting many forms of discrimination on the basis of sex. By virtue of the Equal Protection Clause of the Federal Constitution (and equivalent state constitutional provisions) and federal and state civil rights legislation, as well as more direct state constitutional and statutory provisions generally known as "Equal Rights Amendments," the Equal Protection Clause of the Fourteenth Amendment confers a federal constitutional right to be free from gender discrimination at the hands of governmental actors which is broad enough to prohibit state actors from engaging in intentional conduct designed to impede a person's career advancement based on her gender.

In an attempt to eliminate all forms of sex discrimination, a federal constitutional amendment was proposed in 1972 which would have prohibited the denial or abridgment of equal rights on the basis of sex. However, even though the time for adopting that amendment was extended by Congress, the amendment ultimately failed to be approved by the requisite number of states and was not adopted.

Observation: Congress has the power to enforce the Equal Protection Clause by passing appropriate legislation. The Equal Pay Act, which has been made applicable to the states, is one example of an antidiscrimination measure that should be viewed as an exercise of this congressional power of enforcement.

Caution: The only principles and cases discussed in the following sections relating to sex discrimination are those based on federal and state equal protection clauses or sections found in the federal and state constitutions. Sex discrimination rulings based on federal and state statutes, and specifically on federal and state civil rights statutes, are discussed in other articles.

827 Under Equal Protection Clause; generally

Sex is a suspect classification under the Equal Protection Clause, calling for heightened scrutiny. Classifications based upon sex or gender, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny of an intermediate nature under the Equal Protection Clause. Hence, to withstand a constitutional challenge under the Equal Protection Clause, classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.

828 Applicability to men as well as to women

Any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands dissimilar treatment for men and women who are similarly situated, and therefore involves the kind of arbitrary legislative choice forbidden by the Constitution. Although most sex discrimination cases involve discrimination against women in favor of men, reverse discrimination in favor of women and against men is also a violation of equal protection.

The fact that a statutory scheme expressly discriminates against men rather than women does not protect it from scrutiny.

829 Remedial legislation

The legislature may provide for the special problems of women without offending the Equal Protection Clause. The Supreme Court has stated that, with regard to the constitutionality of certain sex-based statutory classifications under the Equal Protection Clause, the unquestioned right of a state to further a desirable end by legislation is not in itself sufficient to justify a gender-based distinction, but rather it must be shown that the distinction is structured reasonably to further such end, and the statutory classification must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike.

Programs or legislation which create gender-based preferences violate the Equal Protection Clause unless there is a firm basis in evidence that such programs are necessary to remedy past discrimination and that such programs are narrowly tailored to accomplish such a remedial purpose. A gender-conscious remedial scheme satisfies constitutional equal protection requirements if it directly protects the interests of the disproportionately burdened gender. Sex classifications may be used to compensate women for particular economic disabilities they have suffered, to promote equal employment opportunity, and to advance the full development of the talent and capacities of the nation's people; but such classifications may not be used to create or perpetuate the legal, social, and economic inferiority of women.

Where the state's compensatory and ameliorative purposes are as well-served by a gender-neutral classification as one that gender-classifies and therefore carries with it the baggage of sexual stereotypes, the state cannot be permitted to classify on the basis of sex, and such is doubly so where the choice made by the state appears to redound -- if only indirectly -- to the benefit of those without need for special solicitude. A distinction which on its face is not sex-related may nonetheless violate the Equal Protection Clause if it is in fact a subterfuge to accomplish a forbidden discrimination.

Although the test for determining the validity of gender-based classifications is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. If the statutory objective of a gender-based classification is to exclude or protect members of one gender because they are presumed to suffer from some inherent handicap or to be innately inferior, the objective itself is illegitimate. In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.

The general rule that legislative classification denies equal protection only if it is not rationally related to a legitimate state interest does not apply when a law classifies individuals by gender. When the government classifies by gender, it must demonstrate for the purpose of equal protection that the classification is substantially related to an important governmental interest, requiring an exceedingly persuasive justification. Gender-based discrimination is unconstitutional, absent a showing that the classification substantially furthers an important governmental interest.

830 Pregnancy discrimination

Because normal pregnancy is an objectively identifiable physical condition with unique characteristics, absent a showing that distinctions involving pregnancy are mere pretexts designed to effect invidious discrimination against members of one sex or the other, a classification based on pregnancy does not constitute a gender-based classification under the Equal Protection Clause. Distinctions based on pregnancy are therefore analyzed under the rational relationship standard.

Despite this, some states, such as California, construe their own constitutions such that pregnancy discrimination is a form of sex discrimination.

831 Proving sex discrimination

Under an equal protection analysis, parties who seek to defend a gender-based governmental action must demonstrate an exceedingly persuasive justification for that action. The burden of justification for an official classification based on gender under equal protection analysis is demanding and it rests entirely on the state. When a statute, gender-neutral on its face, is challenged on the ground that its effects upon women are disproportionably adverse, a two-fold inquiry is appropriate: the first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination, and in the second inquiry, impact provides an important starting point, although purposeful discrimination is the condition that offends the Constitution.

The legislature may not make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class; but, because the Equal Protection Clause does not demand that a statute necessarily apply equally to all persons or require things which are different in fact to be treated in law as though they were the same, statutes are valid where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.

A party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an exceedingly persuasive justification for the classification and that burden is met only by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to achievement of those objectives. Gender-based discrimination is unconstitutional, absent a showing that the classification substantially furthers some important governmental interest.

The Equal Protection Clause protects against classifications based on gender. The standard of review under the Equal Protection Clause does not depend on the race or gender of those burdened or benefitted by a particular classification.

832 Education; school athletic programs

The states violate the Equal Protection Clause when their laws favor the members of one class over another, or exclude one class but not another, in the course of providing educational opportunities for their citizens. Thus, the policy of a state-supported university, which limited its enrollment to women, of denying otherwise qualified males the right to enroll for credit in its nursing school violated the Equal Protection Clause. It is also a violation of the Equal Protection Clause for a state-supported military school or university to limit its enrollment only to men, and to deny such enrollment to women. A policy in an elementary school that forbids students from wearing jewelry or other attachments not consistent with community standards, under which a male student was forbidden from wearing an earring, was substantially related to the legitimate educational function of the school, and so was not gender discrimination in violation of the student's equal protection rights, in light of evidence that the enforcement of community standards of dress instilled discipline.

School athletic programs are often seen as providing unequal protection of the laws to female students. Thus, an order requiring a university to comply with Title IX of the Civil Rights Act by accommodating fully and effectively the athletic interests and abilities of its women students satisfied equal protection requirements, even though it was explicitly gender-conscious. The governmental objectives of avoiding the use of federal resources to support discriminatory practices, providing individual citizens effective protection against those practices, and the judicial enforcement of federal antidiscrimination statutes were important governmental objectives; and the means employed by a district court in fashioning relief were clearly and substantially related to the statutory objectives, the relief intentionally and directly assisted members of the sex that was disproportionately burdened, and male students would not be disadvantaged by the full and effective accommodation of the athletic interests and abilities of the female students. Though a student has no constitutional right to participate in interscholastic athletics, any program of interscholastic sports, after having been provided, must be administered without violating the Fourteenth Amendment, at least if the case involves an equal protection claim arising from gender-based discrimination. Nevertheless, for the purpose of determining whether a gender-based discrimination is justifiable in the context of student participation in athletics, student safety is an important governmental objective.

833 Employment; sexual harassment

In some instances, the Equal Protection Clause covers the rights of females to seek and retain employment on the same basis as male employees. For instance, employees have a constitutional right to be free from unlawful sex discrimination and sexual harassment in public employment, and sexual harassment under color of state law violates equal protection. To sustain an equal protection claim of sexual harassment, a plaintiff must show both sexual harassment and an intent to harass based upon that plaintiff's membership in a particular class of citizens.

Practice guide: To the extent that a ß 1983 plaintiff linked her alleged retaliatory dismissal from county employment to her gender, that allegation constituted a part of her equal protection discrimination (i.e., hostile work environment, sexual harassment) claim; however, a pure or generic retaliation claim does not implicate the Equal Protection Clause. To prevail on a hostile work environment sexual harassment claim under the Equal Protection Clause, a ß 1983 plaintiff has to show that she belongs to the protected group at issue, that she was subjected to unwelcome sexual harassment, that the harassment was based upon her gender, that the harassment affected the conditions of her employment, that the county acted under color of law, and that the county acted with a discriminatory purpose or intent. An alleged discriminatory effect on women resulting from the National Security Agency's (NSA) exemption of internationally renowned mathematicians from undergoing polygraph examinations otherwise required for security clearances was not, by itself, sufficient to demonstrate an equal protection violation, absent evidence that NSA adopted such exemption with an intent to discriminate against women. And a former public employee's allegations that she and other female employees were disparately treated from similarly situated male employees in the course of being investigated, disciplined, and prosecuted for some alleged wrongdoing and that the public employer had long engaged in a continuing course of conduct, policy, and custom whereby women had been treated differently than similarly situated men in the terms and conditions of employment, including discipline and prosecution for wrongdoing, were sufficient to state a claim under the Equal Protection Clause.

There are some situations where the Equal Protection Clause may apply to private employment situations, most notably where laws enacted by the state are themselves discriminatory on the basis of sex or gender. Thus, a city ordinance prohibiting massagists from treating persons of the opposite sex except upon the signed order of a licensed physician, chiropractor, or physical therapist violates equal protection guarantees. But city zoning ordinances controlling adult entertainment establishments have been held not violative of equal protection by regulating the public exposure of female breasts, but not male breasts.

834 Jury selection

The Equal Protection Clause prohibits discrimination in jury selection on the basis of sex or gender or on an assumption of bias by the venireperson in a particular case for no reason other than gender. It also prohibits the exercise of peremptory strikes that are based solely on gender. While generalizing about the people's traits in order to predict their biases as jurors may be integral to the "art" of jury selection, there are limits to that practice. The elimination of potential jurors because of generalizations based on gender implicates the Equal Protection Clause and is an abuse of peremptory strikes. The intentional use of gender when selecting jurors violates a defendant's right to an impartial jury under the Equal Protection Clause. In a trial involving charges that a defendant had kidnapped his estranged girlfriend and burglarized her home, it was not a violation of equal protection for the trial court to allow the state to exclude males from the jury, as all of defendant's peremptory strikes had been used in an attempt to exclude females from the jury, the state had provided gender-neutral reasons for each of its peremptory strikes in response to defense objections, and one of the jurors passed over by the state was a male.

Practice guide: An opponent of a peremptory strike who contends that a strike was exercised as a result of some impermissible gender discrimination in violation of the Equal Protection Clause must make a prima facie showing of intentional gender discrimination before any explanation by the proponent of the strike is required. If the opponent makes such a showing, the burden shifts to the proponent to give a nonpretextual explanation for the strike. Once the proponent tenders a gender-neutral explanation, then the court must decide if the opponent has proved purposeful gender discrimination.

835 Other matters

The Equal Protection Clause has been applied in numerous other areas. In the area of Social Security, in order to find a gender-based classification of an exception to the pension offset provision in the 1977 amendments to the Social Security Act constitutional, the Secretary of Health and Human Services was required to show a legitimate and exceedingly persuasive justification for the classification and to demonstrate a direct, substantial relationship between the classification and an important governmental objective it purported to serve. Under the 1977 amendments providing the "pension offset" that generally required reduction of spousal benefits by the amount of certain federal or state government pensions received by the social security applicant, an exception for those spouses who were eligible to receive pension ben-

efits prior to December, 1982 and who would have qualified for unreduced spousal benefits under the Act as it was in effect and being administered in January, 1977 was constitutional, even though the offset exception temporarily revived gender-based eligibility requirements invalidated by a previous decision.

A Louisiana statute giving the husband, as "head and master" of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent violated the Equal Protection Clause; the fact that the wife could have made a "declaration by authentic act" prohibiting her husband from executing the mortgage on her home without her consent was immaterial, since the absence of an insurmountable barrier will not redeem an otherwise unconstitutionally discriminatory law. A statute protecting a portion of a widow's share of her deceased spouse's estate from all creditors except mortgage or lien creditors was interpreted so as to apply equally to a widower, consistent with equal protection requirements. The statute that protected a portion of the widow's share in her deceased spouse's real estate against certain creditors, but did not extend the same protection to widowers, would otherwise violate equal protection, given the absence of any justification for a preference to widows.

Additional requirements for citizenship of an illegitimate child born outside the United States of an alien mother and an American father do not represent an unconstitutional denial of equal protection based on the status of the child or the sex of the parent. The desire to promote early ties to United States citizen-relatives and the recognition that mothers and fathers of illegitimate children are not similarly situated support the additional requirements.

The equal protection of the laws also applies in such important areas as --

-- credit opportunity.

-- domestic relations.

-- housing.

-- military benefits and allowances for persons in military service.

-- probate.

-- public accommodations.

-- railroad retirement benefits.

-- sales of intoxicating liquors.

-- sports and athletics, generally.

-- workers' compensation laws.

836 Under state equal rights amendments; generally

A number of states have adopted equal rights provisions in one form or another or have such provisions in their constitutions. For convenience, throughout this part of the article, the equal rights provision is ordinarily referred to as the "equal rights amendment," or "ERA," even though in some states it is not an amendment, and even though the courts of the state itself may not refer to it in that manner.

837 Construction and application, generally

The states which have adopted equal rights amendments are by no means uniform in their construction of these provisions. Construction of the equal rights amendment has ranged from an absolute or literal interpretation, through a "strict" standard interpretation, to what has been called a permissive interpretation. Adopting what has been called the "absolute" or "literal" interpretation, some courts have interpreted their equal rights amendments as prohibiting the government from making any distinctions based on sex, although a few have permitted classifications "reasonably" based on physical characteristics unique to just one sex.

In some states, courts have ruled that the state ERAs have elevated sex to a suspect class, thereby invoking a strict scrutiny review when a law differentiates on the basis of gender, even though the federal equal protection clause requires only an intermediate scrutiny of such a classification. Other courts construe their ERAs as permitting any classification on the basis of sex so long as the classification is reasonably related to a legitimate state interest.

838 Construction and application in relation to particular matters; family law matters

By far, most of the litigation involving the equal rights amendment has been in the field of family law. An equal rights amendment requires that the doctrine of paternity by estoppel be applied to mothers as well as to fathers. Laws govern-

ing the family relationship, designed as they are on the basis of fixed rights and responsibilities which have traditionally differed between husband and wife, commonly discriminate on the basis of sex. This makes much of the family law vulnerable to attack under the various state equal rights amendments. It has been held, however, that the ERA has not outlawed the breach of promise suit, even though American mores may make it impossible for a man to recover from a woman for breach of promise.

The equal rights amendment has been held to invalidate those state marriage license laws that impose a different minimum age on females than on males. Under one state ERA, a wife may not be denied the right to change her name back to her maiden name. But it has also been held that the amendment does not legalize "marriages" between persons of the same sex.

Although laws making it a crime for a husband to abandon his wife are common, prior to the equal rights amendments there were probably no similar laws governing a wife's abandonment of her husband. A statute which makes it a crime for a husband to abandon his wife without also making it a crime for the wife to abandon her husband violates the equal rights amendment, thereby invalidating the statute. A state equal rights amendment is applicable to the rights and duties of a man or woman after they get married, despite the fact that the interests of the children of the marriage may be affected; thus, a statute which allows wives but not husbands to obtain divorces when certain marital misconduct has occurred is read in such a way as providing for the reciprocity of remedies for spouses, and thus is constitutional.

A state ERA permits a court to order a husband to make support payments under certain circumstances, and this does not violate the state ERA where other statutes existed providing the husband with similar relief from the wife under proper circumstances. Court decrees granting such payments to wives have been upheld.

Prior to the ERA it was generally held that custody of a child of tender years, or of a girl of more mature years, should ordinarily be given to the mother if she was found to be fit to have custody and could supply a proper home. This rule, it has been held, violates the equal rights amendment. It is generally held that under the equal rights amendments, the responsibility for child support rests equally upon the parents, but that the burden of providing such support must be borne by each parent in accordance with his or her ability to contribute. Moreover, while the mother may not be required to take a job to enable her to assist in such support, if she remarries, her new husband's income becomes a factor to be considered in determining her ability to provide support.

Although the equal rights amendments have not affected the rule which prohibits tort suits between husband and wife, it has also been held that the amendment does allow a wife, like her husband, to sue others for such things as medical expenses or loss of consortium. The amendment also requires that questions concerning the ownership of property as between husband and wife must be governed by rules which apply to the wife and the husband equally.

Where it has been the rule that a husband was legally responsible for his wife's medical expenses, but the wife was not made responsible for the husband's medical expenses, the equal rights amendment, it has been held, requires that the wife be made equally liable for the husband's medical expenses. But the equal rights amendment was not violated by a statute which entitled a husband, upon the death of his wife, to take a prescribed share of the deceased wife's property, if other statutes entitled wives to a similar right under comparable circumstances. The ERA has also been considered violated in a variety of other matters where a state has treated a wife differently than it treated the husband, but there has also been authority to the contrary in this regard.

839 Criminal law matters

A court will uphold prison regulation limiting a prisoner's constitutional rights under a state equal rights amendment if that regulation is reasonably related to a legitimate penological objective. A prison regulation that restricted the hair length of male inmates but not female inmates was reasonably related to the legitimate penological interest of advancing security, in light of the differing physical and psychological characteristics of male and female inmates, and thus did not violate a prisoner's rights under the state ERA.

The ERA has been invoked in a number of other cases. Thus, discriminating between males and females on the maximum age for treatment as a juvenile has been ruled invalid under the ERA, where females were held subject to the lower age limit prescribed for males. A state statute on driving while intoxicated that allowed males to be confined beginning at age 17, but did not allow females to be confined until age 18, was held to be an unconstitutional violation of the ERA, and so much of the statute as protected females from being confined until age 18 was invalidated.

Even though a statute is written or applied so that only males can commit a particular crime such as rape, illicit sexual relations, or pandering or prostitution, such statutes generally have been upheld under the ERA.

A general sentencing statute that allowed females to be immediately available for parole while delaying males' availability for parole was held improper under the ERA. Incest statutes which make the crime more serious and the punishment greater if committed by a male rather than a female have been upheld under the ERA. Similarly, a statute giving a father a cause of action for seduction of his unmarried daughter creates a gender-based classification that violates the Equal Protection Clause of the state constitution because only men may be civilly liable under the statute. And a claim by female defendants that an ordinance prohibiting women from sunbathing or swimming in public with their breasts exposed violated the state ERA, as well as other constitutional provisions, because men were not required to wear tops while engaging in these activities, has been rejected.

840 Other matters

A rebuttable common-law presumption that a husband solely owns all of a marriage's household goods violates the ERA; thus, a presumption could not be applied in a probate dispute about the extent of a deceased husband's interest in a liquor decanter collection since the presumption that the husband owned the property impermissibly differentiated between the sexes. A number of states interpret their ERAs as not prohibiting differential treatment among the sexes when that treatment is reasonably and genuinely based upon physical characteristics unique to one sex. And it has also been held permissible under the ERA for a local government to allow women with young children an exemption from jury duty.

A provision in a state open-space law permitting single-sex private country clubs to contract with the state to preserve open space for a definite period of time in exchange for reduced or deferred property taxes, notwithstanding its discrimination on the basis of sex which was otherwise prohibited by the same statute, violates the ERA.

As for other matters, the ERA has been held to require that females be permitted to compete with males in all public school interscholastic sports, including football and wrestling. The ERA prohibits a public university from providing on-campus housing for women only, and from requiring all female students to live on-campus while allowing male students to live off-campus. But it has also been held that a public school does not violate the amendment by regulating the length of male students' hair, but not regulating that of female students.

Finally, where a public charitable trust clearly limited the beneficiaries to males only, the ERA has been used to resolve an ambiguity (created by consideration of the trustor's alleged attitude toward the matter) in favor of expanding the class of beneficiaries to include both sexes.

841 Size, amount, or quantity

In some cases, size, amount, or quantity may be an appropriate index for classification, creating such differences that it may be properly used as a basis for a legislative discrimination between the large and the small, since it is within the competence of the legislature to determine that control of the smaller manifestations of a particular evil would not appreciably eradicate the evil whereas regulation of large manifestations would. This principle has been applied in various matters and with varying results, with legislation keyed to the size, amount, or quantity of --

-- real property.

-- potential damage awards.

-- insurance.

-- earnings.

-- sales volume.

-- loans.

-- population.

-- license fees.

-- taxes.

-- building regulations.

-- zoning regulations.

-- criminal offenses.

But the law cannot discriminate between the great and the small where size is not an index to an admitted problem or evil.

842 Numbers

Classification based on numbers is not necessarily unreasonable. There are many instances in which it has been sustained. The comparative numbers in classifications made by the legislature are not determinative of its right to classify, except that the fewer in the class the more closely will the court examine the legislation. Of course, if the mere factor of numbers can form no reasonable basis for a classification, considering the matters dealt with and the purpose of the law, discriminations based solely upon numbers are invalid.

843 Exemption of minima

A form of classification which is generally upheld, although it depends to a large extent on values and amounts, is that embodied in exemption statutes. These may be of various kinds, and there are numerous decisions which uphold statutes exempting property from execution and attachment, such as the homestead of the debtor, the books and library of the professional man or woman, the surgical implements of the physician, or the household furniture and other articles belonging to ordinary debtors. Such acts when based on proper classification are generally sustained.

844 Locality or territory

The Equal Protection Clause relates to equality between persons as such, rather than between areas or localities. Territorial uniformity is not a constitutional prerequisite. Consequently, it is well-settled that the Constitution of the United States in securing the equal protection of the laws does not prohibit legislation which is limited as to the territory within which it is to operate. In the absence of restrictions contained in state constitutions, the legislature may determine within broad limits whether particular laws shall extend to the whole state or be limited in their operation to particular portions of the state. All that the Federal Constitution requires is that they shall be general in their application within the territory in which they operate. Classification based on a limited geographical area designated by a certain number of miles beyond a political boundary is not per se arbitrary or discriminatory. Even the fact that a statute applies only to one locality does not necessarily render it unconstitutional, although this fact is to be considered in determining its validity. It is necessary, however, that there be a reasonable basis for the limitation or differentiation and that all persons similarly situated in the same territory be treated alike.

Observation: In some state constitutions, there are provisions which require that laws should have a uniform operation throughout the state. Such provisions have been interpreted to mean universal operation as to all persons and things in the same condition or category, so that whenever a law is available in every part of the state as to all persons and things in the same condition or category, it is of uniform operation throughout the state. Many laws have been sustained which classify by forbidding certain acts in specified territories or which require licenses or other special conditions before persons are allowed to do certain things in particular territories. Such statutes do not deny the equal protection of the laws, because they do not discriminate among persons, but apply equally to all persons within or without the territory to which the distinction is made applicable. There is a difference between a statute making certain regulations applicable to residents of a certain territory, which may be valid, and one imposing conditions upon such persons as may not happen to be residents of a particular territory, which latter distinction is invalid. But classifications by counties, or otherwise, for the purpose of prescribing regulations or exactions that in effect impose different burdens upon some of the citizens of the state from those imposed upon other citizens under practically similar conditions, with no conceivably just basis for the classifications or discriminations, constitute a denial of the equal protection of the laws to those injuriously affected. And when fundamental rights or suspect classifications are at stake, a state's general freedom to discriminate on a geographical basis will be significantly curtailed by the Equal Protection Clause.

The constitutional guarantee of equal rights is not infringed by making a police regulation applicable only in certain cities of a state. Police regulations may operate on certain localities or certain districts only, because of peculiar conditions justifying such regulations, but such regulations may be held invalid when there is no fundamental, organic difference justifying the discrimination. For legitimate purposes falling within the domain of the police power, restrictions may be imposed on the conduct of certain businesses in designated localities or districts within a municipality.

It is competent for the legislature, in matters pertaining to organization, to classify municipalities or other political subdivisions and make different regulations for the different classes so created. A crucial question in resolving the issue of whether the Equal Protection Clause permits a state to distribute the benefits of assets arising out of federal school land

grants unequally among the school districts is whether federal law requires the state to allocate the economic benefits of school lands to schools in the surveyed townships in which those lands are located; if, as a matter of federal law, the state has no choice, then the state may properly be enjoined from implementing federal policy if the federal policy itself violates equal protection; but if the federal law is valid and the state is bound by it, then the federal law provides a rational reason for the funding disparities.

845 Where locality is determined by population

Under the usual circumstances and for most purposes, the legislature may, in the exercise of the various powers of state sovereignty which it possesses, employ population as a basis for classification, making distinctions applicable to people of different localities on such grounds, without violating any of the federal or state constitutional guarantees of equality. Indeed, distinction by classification according to population is grounded in good sense, since the complexity of community regulation increases directly in proportion to increases in population, and statutes necessary for a large community would be too burdensome for a smaller community. Legislation affecting only certain cities, its operation based upon population, or upon the fact that they are cities belonging to a particular class, has repeatedly been held valid as against the objections that it violates state constitutional provisions requiring uniformity in the operation of laws or forbidding special or local legislation, provided it is reasonable and not arbitrary. Classification of municipalities on such bases has been sustained for a great variety of purposes. Similarly, a law does not violate the requirement as to the equal protection of the laws merely because its operation is confined to cities having a designated population.

The Equal Protection Clause requires that the seats in both houses of a bicameral state legislature be apportioned on a population basis. It is a mistaken idea that because classification on the basis of population is sustainable in respect of legislation on certain subjects, it may be appropriate for all purposes of classification in legislative enactments. Such a basis for classification must have a reasonable relation to the purposes and objects of the legislation, and must be based upon a rational difference in the necessities or conditions found in the groups subjected to different laws. If no such relation and differences exist, the classification is invalid. Moreover, in order to be valid, a classification by population must be open to let in localities subsequently falling within the class, and also to let out localities which either by increase or decrease cease to have the required population. Stated differently, a classification of a specific type of political subdivision, such as counties, based on population, which includes all such subdivisions which subsequently come within its provisions, is a reasonable classification and is a sufficiently rational basis to withstand a constitutional attack even if only a single subdivision is embraced within the class affected by it.

846 Time

The Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time. However, classifications involving time, like any other, must be reasonable, not arbitrary, and rationally related to a legitimate purpose.

A grandfather clause which excepts from an ordinance's prohibition against a certain type of vending in a specified area those vendors who have continually operated the same businesses within such locality for a designated number of years prior to the adoption of the ordinance does not deny equal protection of the laws to a vendor who has so operated for a lesser number of years since, rather than proceeding by the immediate and absolute abolition of all such vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. It is generally held that consideration for existing property rights furnishes a legitimate basis for classification in legislation of a regulatory nature.

Unless a statute is curative or remedial, and therefore temporary, a classification must not be based on existing conditions only, but provision must be made for future acquisitions to the class as other subjects acquire the characteristics which form the basis of the classification. This principle is of considerable importance when attempts are made to draw distinctions based on time, putting in one class all the instances existing on a designated date, and placing all others in another class. Under certain circumstances, where such a procedure would discriminate unwarrantably in favor of establishments, things, or persons existing or engaged in particular occupations on a given date, the courts have held that the classification is in denial of the equal protection of the laws.

Limitations based on the time that a claim is filed or an action commenced are common and are generally approved as reasonable classifications.

Observation: Neither the creation of financial incentives for individuals to establish and maintain a residence in Alaska, the encouragement of prudent management of Alaska's permanent fund, which consists of deposits of state's mineral income, nor the apportionment of benefits in recognition of undefined contributions made by residents during their years of residency rationally justified a distinction that Alaska made between citizens who established their resi-

dence before 1959 and those who since became residents, and thus Alaska's dividend distribution plan, under which Alaska distributed income derived from its natural resources to adult citizens in varying amounts based on the length of each citizen's residence, violated the Equal Protection Clause.

847 Other personal attributes or characteristics; generally

Classifications are often based upon the attributes or characteristics of the persons sought to be dealt with by particular legislation. Legislation has often sought to permit discrimination usually in favor of, but sometimes against, certain groups of society who are identified by special characteristics. Generally speaking, if the courts have been able to ascertain that particular qualities of a group form a reasonable basis for different treatment by the laws and have a proper relation to the purpose sought to be achieved, legislation containing classifications founded on personal characteristics has been sustained. In many instances, however, and with increasing frequency in recent times, such legislation has been held to constitute unconstitutional discrimination. The Equal Protection Clause does not permit discrimination against white persons any more than it permits discrimination against minorities in the absence of a compelling state interest that will pass the strict scrutiny test. A classification is unreasonable and void which is based on such mere physical characteristics as height, weight, complexion, mentality, or other personal attributes which pertain solely to the particular person and not to any relation that that person may bear to others in human conduct and activity.

Personal qualifications on which classifications have been attempted are quite diversified, and many are treated in connection with the particular topic to which they are pertinent. They include race, color, and nationality, or national origin, religion, sex or gender, homosexuality, age, marital or family status, fitness, mental or physical disabilities, homelessness, literacy, alienage, military service, labor union membership, residence, property ownership, and wealth or poverty.

In addition to those bases, it may be noted that classifications have been made or attempted on the basis of a personal characteristic or condition, such as insanity, sexual psychopathy, or illegitimacy.

The Equal Protection Clause also prohibits classification based on social attitudes, styles, or affiliations, as in the case of regulations aimed specifically at "hippies," and extends to the shared political interests of groups otherwise random and diverse, so that "fencing out" from the franchise a sector of the population because of the way it may vote is constitutionally impermissible. On the other hand, discrimination against persons convicted of crimes has been sustained, as in the case of statutory provisions denying the right to vote to convicted felons, or enhancing the punishment of habitual offenders. The Equal Protection Clause is not violated by public library rules requiring patrons to be reading, studying, or using library materials, to respect the rights of others, to avoid noisy or boisterous activities or staring or following with intent to annoy, and to leave the building if bodily hygiene is offensive so as to constitute a nuisance to others.

848 Race, color, or national origin

For purposes of determining the validity, under the Equal Protection Clause of the Constitution's Fourteenth Amendment, of classifications based explicitly on race, color, or national origin, all such classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny -- that is, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. Thus, the central mandate of the Equal Protection Clause demands racial and nationality neutrality in all governmental decisionmaking.

Caution: The Supreme Court has overturned, in the context of preferential contract awards made to minority contractors, its former position that intermediate scrutiny was to be applied to so-called "benign" racial classifications, and has ruled that strict scrutiny applies to all classifications on the basis of race or national origin. The ruling thus establishes that the Equal Protection Clause of the Fifth Amendment applies to protect white-owned businesses as well as minority-owned businesses from discrimination in the award of government contracts in the absence of a compelling state interest that will satisfy the strict scrutiny test.

While the original intent of the Equal Protection Clause was to protect and preserve the rights of recently freed slaves, the clause is now viewed as a protection of the equal rights of all United States citizens and resident aliens, regardless of their race, color, or national origin. Thus, all classifications of persons on the basis of race, color, or national origin are condemned not only by the Equal Protection Clause, but also by federal and state statutes protecting civil rights. Such classifications automatically trigger the strict scrutiny test as they are highly suspect classifications and are presumptively invalid.

The Fourteenth Amendment was, in fact, adopted to prevent state legislation designed to discriminate on the basis of race or color. The Fourteenth Amendment expresses a definite national policy against such discrimination, and classifi-

cations based on such considerations are suspect and thus subject to a more rigid scrutiny than other classifications. Only the most exceptional circumstances can excuse discrimination on such a basis in the face of the Equal Protection Clause.

A racial classification, regardless of its purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification, and such applies as well to a classification that is ostensibly neutral, but which is an obvious pretext for racial discrimination; however, even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose. A racially neutral policy does not violate equal protection solely because of its disproportionate effects; instead, a plaintiff must allege that a classification was adopted because of, not merely in spite of, its adverse effects upon an identifiable group.

Practice guide: A plaintiff seeking to make out an equal protection violation on the basis of racial discrimination must show purpose, but disparate impact and foreseeable consequences, without more, do not establish a constitutional violation; nevertheless, actions having foreseeable and anticipated disparate impacts are relevant to prove the ultimate fact of forbidden purpose.

849 Religion

Classification of persons on the basis of religion is condemned by the Equal Protection Clause of the Fourteenth Amendment. State action which treats one religion differently than another will almost always be invidious discrimination in violation of the Equal Protection Clause, although the invidiousness of religious discrimination will vary depending upon the surrounding context. However, application of the Fair Labor Standards Act to a religious foundation and workers in its commercial activities does not deny equal protection on the basis of differences between treatment of those workers and the government's treatment of its own volunteer workers, as Congress could rationally have concluded that minimum wage coverage of its volunteers is not required to protect the volunteers or to prevent unfair competition with private employers. Heightened scrutiny is applicable to a statute that applies selectively to a religious activity only if the plaintiff can show that the basis for the distinction was religious, not secular; if the basis for the distinction is secular, then the court reviews the statute to determine whether it classifies persons it affects in a manner rationally related to legitimate governmental objectives.

Caution: Despite the rule prohibiting classifications based on religion, where a statute is neutral on its face and motivated by the permissible purpose of limiting governmental interference with the exercise of religion, there is no justification for applying strict scrutiny, for equal protection analysis purposes, to a statute that passes the *Lemon* test; the proper inquiry is whether Congress has chosen a rational classification to further a legitimate end.

As applied to the nonprofit activities of religious employers, the provision of the Civil Rights Acts exempting religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion was rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions, and thus the exemption did not violate the Equal Protection Clause.

850 Homosexuality

Homosexuality is not a suspect or quasi-suspect classification for the purpose of equal protection analysis, and while homosexuals are protected by the Equal Protection Clause, statutes or regulations making classifications on the basis of homosexuality or homosexual conduct are analyzed under the rational relationship test, not the strict scrutiny test.

The so-called "don't ask, don't tell" policy embodied in federal law and concerning the status of homosexuals in the United States armed forces provides generally that a person who engages in homosexual acts will be discharged from military service unless he or she demonstrates, inter alia, that such conduct departs from his or her usual behavior and is unlikely to recur, and that he or she does not have a propensity or intent to engage in such conduct. Moreover, a person who declares himself or herself to be a homosexual or a bisexual will be discharged unless he or she demonstrates that he or she does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts. Finally, a person who has married or attempted to marry a person of the same sex will be discharged. The "don't ask, don't tell" policy is subject to equal protection analysis under the rational relationship test, rather than under strict scrutiny, and has been held not to represent mere irrational catering to prejudice against and hatred of homosexuals such that it violates equal protection rights. The involuntary discharge from the Navy, under the "don't ask, don't tell" policy, of a person who engages in homosexual acts does not violate the Equal Protection Clause; the relationship between the Navy's mission and the discharge of persons who engage in homosexual acts is not so attenuated as to render arbitrary

and irrational the distinction in this context between homosexual and heterosexual acts. The rebuttable presumption of the "don't ask, don't tell" policy -- that a person who states that he is a homosexual will likely engage in homosexual conduct -- does not violate equal protection rights, since the policy is rationally related to the military's interest in maintaining effective armed forces.

In a case not involving military service, the Equal Protection Clause was held not violated by a city's decision not to rehire a laid-off police officer as the result of information indicating that he might have engaged in illicit homosexual activities in restrooms at a state university several years before he began his employment; the city's removal of the officer from its civil service reemployment list was held rationally related to the legitimate governmental purpose of protecting the police department from acts prejudicial to departmental service and contrary to the public interest. Requiring two parties to be legally married in order to file a joint bankruptcy petition does not violate the equal protection rights of a homosexual couple, inasmuch as the rule applies to both heterosexual and homosexual couples. And another court granted summary judgment to the Central Intelligence Agency on a homosexual employee's claim that he was discharged in violation of his equal protection rights, where the discharge was seen to be rationally related to a legitimate government interest in collecting foreign intelligence and protecting the nation's secrets. The CIA was held to have a legitimate concern about the employee's trustworthiness due to his hiding of information about his involvement in homosexual activity, despite his suspecting or knowing that the CIA considered such involvement to be a matter of security significance.

A transsexual prisoner is not a member of any protected class for equal protection purposes.

A statute providing that it is a crime against nature for a human being to solicit another with intent to engage in any unnatural carnal copulation for compensation did not facially discriminate against gay men and lesbians; the conduct punished by the statute was not unique to gay men and lesbians, and heterosexuals could be convicted under this statute.

851 Age

Because age is not a suspect classification, legislative distinctions based on age ordinarily are subject to a rational basis review for purposes of an equal protection challenge. Minimum and maximum ages, where clearly relevant and appropriate, may be fixed as a qualification for such matters as public office or employment, serving in the military, Social Security benefits, voting, and so forth, and in general such requirements are not objectionable on equal protection or other constitutional grounds. However, classification on the basis of age, in the context of employment generally, is considered an inherently invidious category, and will be struck down if not reasonably related to a state interest and if totally arbitrary.

852 Minors

Children are not a suspect class under the Equal Protection Clause, and a statutory classification of minor children with permanent legal disabilities due to diminished capacity is not a suspect classification. Nonetheless, a provision of a condominium declaration which prohibited all children under 16 from permanent residence, except children of transferees from an institutional first mortgagee, violated equal protection by its arbitrary creation and treatment of two classes of grantees, and was held unenforceable. And discrimination against minors by a state's three-year statute of limitations applicable to medical malpractice actions by application of a wrongful act point of accrual bears no rational relationship to the statute's objectives and violates the Equal Protection Clause. However, a similar statute of repose in another state, contained in a statute of limitations governing persons under legal disability under which minor plaintiffs are treated differently than adult plaintiffs, has been held rationally related to a legitimate legislative objective of helping health care providers procure available and affordable medical malpractice insurance so that providers will practice medicine in the state, and does not violate the Equal Protection Clause, and a shorter statute of repose, eight years, applied to plaintiffs under a legal disability such as minority, incompetence, or incarceration, in contrast to a 10-year statute of repose applied to other plaintiffs, does not violate equal protection. A statute of limitations for an action for damages for injury to a minor as a result of sexual abuse, allowing such victims to bring actions until 17 years after they reach the age of majority, is for equal protection purposes, rationally related to a legitimate state interest in deterring the sexual abuse of children, and in providing a means for victims of childhood sexual abuse to recall traumatic events and understand the harm done to them before seeking redress. In order to pass an equal protection challenge to statutes of limitations that apply to suits to establish paternity, thereby limiting the ability of illegitimate children to obtain support, the limitation must allow for a reasonable opportunity for a child or those with an interest in the child to assert claims on the child's behalf, and any time limitation placed on that opportunity must be substantially related to the state's interest in avoiding the litigation of stale or fraudulent claims.

It is undeniable that the equal protection guarantees provided by the federal and state constitutions are equally applicable to the young as well as the old. Still, minors, always objects of special solicitude on the part of the law, constitute a class founded on a natural and intrinsic distinction from adults. Legislation peculiarly applicable to minors is necessary for their protection and, when induced by rational considerations looking to that end, its validity may not be challenged. The controlling principle is that the state, as parens patriae of immature children, may legislate for their safety, health, morals, and general welfare. Thus, a nocturnal juvenile curfew ordinance which makes it a misdemeanor for persons under 17 to use city streets or to be present at other public places within city between certain hours does not violate the Equal Protection Clause, inasmuch as the classification promotes the compelling governmental interest of reducing juvenile crime and victimization, while promoting juvenile safety and well-being, and the ordinance employs the least restrictive means of accomplishing its goals by containing various defenses that allow affected minors to remain in public areas during curfew hours. A city ordinance restricting admission to certain dance halls to persons between the ages of 14 and 18 does not violate the Equal Protection Clause because it is rationally related to the city's legitimate effort to protect teenagers within that age group from what could be the corrupting influences of older teenagers and young adults.

The legislature may classify persons by age for the purpose of determining punishment for crimes; and when the classification is reasonable, not arbitrary or capricious, there is no constitutional bar to the classification. The legislature may also classify persons by their age for the purpose of dealing with them as dependent or delinquent persons within the provisions of a regulatory statute such as a juvenile court law. But a parole statute distinguishing between convicts with respect to age has been held to violate the Equal Protection Clause and also a state constitutional provision against the grant of special privileges or immunities.

853 Marital or family status

Since the right to marry is considered a fundamental constitutional right, any statute affecting such right is subject to strict judicial scrutiny and must be supported by a compelling state interest. A state antimiscegenation statute thus violates equal protection, but a statute which prohibits the marriage of persons of the same sex does not.

Classifications based on marital status are ordinarily not suspect, for equal protection purposes. The same is true of distinctions between lawful marriages and common-law marriages. However, a distinction between married and unmarried persons may constitute a denial of equal protection of the laws as to the latter group, as in the case of a state statute permitting distribution of contraceptives to married persons but prohibiting such distribution to unmarried persons, or a statute requiring parental consent to unmarried minors' abortions. A distinction between married and divorced women under a provision of the Social Security Act has been sustained as rational and consistent with the overriding aim of the Act to protect workers and their families. And school or university regulations distinguishing between married and single students have generally been held not to violate the Equal Protection Clause.

Failure to send assistance in response to a report of a husband being on his way to kill his wife states an equal protection claim where no rational basis exists for a county's alleged policy of affording victims of domestic violence less police protection than other crime victims. Under equal protection analysis, protection of the marital estate or community property rights does not impinge upon a "fundamental right" so as to warrant strict scrutiny of government classifications that threaten them. Statutes allowing spouses who are omitted from wills to take a share of their deceased spouses' estates does not violate equal protection.

A homestead statute which excludes from its protection single persons without dependents except a widow or widower still living in the former marital domicil has been held not to violate the Equal Protection Clause. A village zoning ordinance restricting land use to one-family dwellings and excluding lodging houses, boarding houses, fraternity houses, or multiple-dwelling houses, is not unconstitutional because it prohibits occupancy of a dwelling by more than two unrelated persons as a "family," while permitting occupancy by any number of persons related by blood, adoption, or marriage.

854 Fitness

Classification of persons may be made according to their personal fitness to carry on particular businesses or professions. This is characteristic of all license laws, and so far as they provide that all persons desiring to engage in a particular occupation shall be examined as to fitness or otherwise show that they possess proper qualifications, such laws have usually been held valid. For instance, a classification which prohibits the hiring of police officers who are unable to run, jump, hop, stoop, turn, pivot, or perform similar movements without aid is rationally related to the asserted goal of protecting the public by having physically fit police officers and does not amount to a denial of equal protection. And equal

protection principles are not violated by a regulation that prohibits persons with an established medical history or clinical diagnosis of epilepsy from driving trucks in interstate commerce, since the regulation is rationally related to furthering the legitimate state interest in public safety. The courts have also held that the making of appointments to public office or employment based on fitness, to be ascertained by competitive examination as far as possible, does not create an unconstitutional discrimination between different classes of citizens in regard to the right to enter upon and continue in the public service.

Physical prowess requirements of employers have generally been rejected as not constituting a bona fide occupational qualification which is recognized as an exception to the prohibition against sex-based discrimination in employment under Title VII of the Civil Rights Act of 1964. Similarly, employment practices involving such matters as health, height, or weight, testing, and educational requirements have frequently been attacked successfully as race and national origin discrimination, violative of the various Civil Rights Acts.

855 Mental and physical disabilities; alcoholism and drug abuse

Mentally disabled persons do not constitute a suspect or quasisuspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation. This is so because the states' interest in dealing with and providing for the mentally disabled is a legitimate, distinctive, legislative response, both national and state, to the plight of such persons, which interest demonstrates not only that they have unique problems, but also that lawmakers have been addressing their difficulties in a manner that belies any continuing antipathy or prejudice and the corresponding need for more intrusive oversight by the judiciary. Additionally, the mentally disabled are not politically powerless, and, if they were deemed quasisuspect, it would be difficult to find a principled way to distinguish other groups who have immutable disabilities setting them off from others, who cannot themselves mandate desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. Nonetheless, employers may not deny equal protection to mentally disabled employees. Under federal law, equal protection within the field of education requires the provision of equal educational opportunity to all children within the state, not only to the able but to the disabled or disadvantaged, and the federal concept of equal protection in the field of education overrides state provisions that may be less broad; however, merely because an educational program may be imperfect does not render it constitutionally invalid.

Caution: A rational basis exists for a statutory imposition of a higher burden of proof upon proceedings for involuntary commitment of mentally ill persons than for mentally disabled persons. The imposition of a standard of proof of beyond a reasonable doubt upon the commitment of the former, and only clear and convincing evidence upon commitment of the latter, is justified by the relative ease of diagnosis of mental disabilities, such that assigning a higher burden of proof to a mental illness equalizes the risk of erroneous determination. The higher standard for mentally ill persons is also justified on the ground that, in general, their treatment is much more intrusive than that received by mentally disabled persons.

Observation: A statute prohibiting the unlawful possession of a firearm after commitment to mental institution is not unconstitutional on equal protection grounds as applied to a defendant who fails to make a threshold showing that he is similarly situated to defendants who have neither been adjudicated to be mentally ill nor ordered to be committed to a mental institution, as the defendant had been.

The prohibition against discrimination against physically disabled individuals stems from the constitutional requirement for equal protection. However, the physically disabled are not a protected suspect class for purposes of equal protection under the Fourteenth Amendment; thus, a rational basis scrutiny is appropriate for analyzing equal protection claims by members of that group.

The status of being an alcoholic or a recovering alcoholic is not a suspect class for equal protection purposes, and thus the lowest level of scrutiny applies to actions allegedly taken in response to a person's status as an alcoholic. Drug users are not a suspect class. Thus, the New York City Transit Authority's blanket exclusion from employment of persons who regularly use narcotic drugs, including methadone, does not violate the Equal Protection Clause for failing to include more precise special rules for methadone users who have progressed satisfactorily with their treatment and who, when examined individually, satisfy the Authority's employment criteria for nonsensitive jobs.

856 Residence and state citizenship

In considering the application of the Equal Protection Clause of the Fourteenth Amendment to legislation discriminating between the residents and nonresidents of a state, the Equal Protection Clause cannot be invoked unless the action of a state denies the equal protection of the laws to persons "within its jurisdiction." If persons are, however, in the purview

of this clause, within the jurisdiction of a state, the clause guarantees to all so situated, whether citizens or residents of the state or not, the protection of the state's laws equally with its own citizens. A state is not at liberty to establish varying codes of law, one for its own citizens and another governing the same conduct for citizens of sister states, except in a case when the apparent discrimination is not to cast a heavier burden upon the nonresident in its ultimate operation than the one falling upon residents, but is to restore the equilibrium by withdrawing an unfair advantage. On the other hand, a nonresident may not complain of a restriction no different from that placed upon residents.

The limitation on the right of one state to establish preferences in favor of its own citizens does not depend solely on the guarantee of equal protection of the laws, which does not protect persons not within the jurisdiction of such a state. These limitations are broader, and nonresidents of a state who are noncitizens are also -- even though they are not within the jurisdiction of a state, as that phrase is employed in the Equal Protection Clause -- protected from discrimination by Article IV, ß 2 of the Federal Constitution, which secures equal privileges and immunities in the several states to the citizens of each state. Moreover, any citizen of the United States, regardless of residence or whether he or she is within the jurisdiction of a state, is protected in the privileges and immunities which arise from his United States citizenship by the privileges and immunities clause of the Fourteenth Amendment.

There is much authority which recognizes the right of the state under certain circumstances to classify residents and nonresidents.

Caution: For recent changes affecting the right of nonresident attorneys to practice law in other states, see ß 547. Utilization of different, but otherwise constitutionally adequate, procedures for residents and nonresidents does not, by itself, trigger heightened scrutiny under the Equal Protection Clause. Thus, reasonable residency requirements are permissible under the Equal Protection Clause in cases involving voting in elections, or local referendums, for holding public office, for jury service, and for the purpose of receiving various types of government benefits, or for tuition purposes, are quite common, and are generally, though not always, held to be valid and proper. However, a statute providing for county-wide territorial jurisdiction of a municipal court may violate the equal protection rights of county residents who are subject to the municipal court's territorial jurisdiction, but not enfranchised to elect municipal judges. Residence may also be a proper condition precedent to commencement of various suits. On the other hand, many license and tax laws which discriminate against nonresidents have been held to violate the Equal Protection Clause. A statute which discriminates unjustly against residents in favor of nonresidents violates the Equal Protection Clause; however, there must be an actual discrimination against residents in order to invalidate a statute. Where residents and nonresidents are treated alike, there is no discrimination. A state regulatory statute exempting nonresidents does not deny the equal protection of the laws guaranteed by the Fourteenth Amendment, where it rests upon a state of facts that can reasonably be conceived to constitute a distinction or difference in state policy.

The constitutional guarantee as to the equal protection of the laws may render invalid statutes and ordinances which effect an unlawful discrimination in favor of a municipality or its inhabitants. Such enactments invalidly attempt to give a preference to a class consisting of residents of a political subdivision of a state.

857 Veterans and other military personnel

Differential treatment of resident veterans as distinguished from nonveterans does not offend the Equal Protection Clause, nor is it unlawful to treat reserve military personnel differently than active military personnel.

Observation: Military personnel do not constitute a suspect class for purposes of equal protection analysis. Thus, analyzing military regulations under a rational basis equal protection review, a court will determine whether the regulations are directed at the achievement of a legitimate governmental purpose and, if so, whether they rationally further that purpose. When judging the rationality of a military regulation, a court owes even more special deference to the considered professional judgment of appropriate military officials than is owed in an ordinary case.

The statutory scheme restricting educational benefits under the Veterans' Readjustment Benefits Act of 1966 (38 USCA ßß 1651-1697) to veterans who served on active duty, thus denying benefits to conscientious objectors who performed required alternative civilian service, does not create an arbitrary classification in violation of such conscientious objectors' rights to equal protection of the laws encompassed by the Fifth Amendment, since: (1) the disruption of one's life caused by military service (a six-year commitment) is quantitatively greater than that caused by a conscientious objector's alternative civilian service (two years); and (2) the far greater disruption of personal freedom suffered by military veterans uprooted from civilian life is qualitatively different than that suffered by conscientious objectors who are not required to leave civilian life to perform their alternative services -- such distinctions forming a rational basis for limit-

ing educational benefits to active service veterans as a means of helping them readjust to civilian life, and the statutory classification also bearing a rational relationship to the Act's purpose of making service in the Armed Forces more attractive.

Discriminatory treatment of military personnel in legislative reapportionment is constitutionally impermissible. And New York's restriction of its civil service veterans' preference only to those veterans who entered the armed forces while residing in New York violates the Equal Protection Clause. However, seamen are not a "suspect classification" for purposes of determining whether a law terminating permanently disabled seamen's rights to free medical care in government facilities violates equal protection.

858 Wealth or poverty

The Federal Constitution is no respecter of the financial status of persons, and rich and poor alike are to be accorded equal rights under it. Moreover, the mere presence of wealth, or lack thereof, in an individual citizen cannot be the basis for valid class discrimination. However, neither poverty nor wealth is a basis for declaring a suspect classification that would give rise to a strict scrutiny analysis under the Equal Protection Clause, and the Equal Protection Clause does not require the states to equalize economic conditions. However, a classification based on poverty or wealth can become a suspect classification, subject to more rigid scrutiny than other classifications, when such classification interferes with a fundamental constitutional right.

Observation: For the purpose of establishing a "suspect classification" in relation to the Equal Protection Clause, discrimination against the poor does not become discrimination against an ethnic minority merely because there is a statistical correlation between poverty and a particular ethnic background.

Classifications based on poverty or wealth are invalid when they interfere with various fundamental rights and interests. For example, a criminal defendant may not be deprived of his or her rights necessary to a fair trial at all stages of the proceedings, merely because of indigency; and this includes the right to counsel and the right of appeal. And equal protection of the laws does not permit a state to imprison an indigent criminal defendant beyond the maximum period authorized by the statute regulating the substantive offense because he or she is unable to pay a fine; the Constitution also prohibits a state from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full. Compelling an incarcerated accused to stand trial in jail garb, over objection, is repugnant to the concept of equal justice embodied in the Fourteenth Amendment, since persons who can secure release are not subjected to such a condition which usually operates against only those who cannot post bail prior to trial. Similarly, a person may not be denied, on the basis of poverty, the right to vote or the right to become a candidate for public office, or the right to interstate travel. Classifications based on wealth have also been struck down under the traditional test for determining the validity of classifications, when they have been found to be arbitrary or to constitute invidious discrimination. Thus, a statute providing that the spouse, parents, or children of a mentally ill person or inebriate shall be liable for the care, support, and maintenance of such person in a state institution of which he or she is an inmate makes an invalid class discrimination. A statute authorizing a school district to charge a fee for transportation is not subject to strict scrutiny when challenged on equal protection grounds based on unavailing arguments that the fee unconstitutionally places a greater obstacle to education in the path of the poor than it does in the path of wealthier families, and that the Equal Protection Clause affirmatively requires the government to provide free transportation to school. And a state, having granted by statute to all defendants in bastardy proceedings the right to a blood test to determine paternity, cannot deny this right to those defendants who are unable to pay the required fee in advance, without violating the Equal Protection Clause of the Constitution, because such a defendant's ability to pay in advance bears no rational relationship to his or her guilt or innocence and because discrimination on this basis constitutes that type of invidious discrimination which is constitutionally prohibited.

Although a state may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program, it may not accomplish such a purpose by invidious distinctions, in violation of the Equal Protection Clause, between classes of its citizens, as, for example, by barring indigent children from its schools. And the saving of welfare costs will not justify an otherwise invidious classification.

On the other hand, where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages, and unless a distinct class of disadvantaged "poor" can be identified, a classification cannot be challenged on the ground of wealth under the Equal Protection Clause. Moreover, classifications based on income or economic status are not unconstitutional if a rational basis exists in their support. For example, states have broad latitude to create classifications within the context of complex tax laws without violating the Equal Protection Clause. And the

provisions of a state Old Age Security Law, requiring adult children to contribute to the support of their parents who were recipients of public assistance, did not thereby arbitrarily charge to one class of society the cost of public assistance to the aged who were poor or in need. State legislation for the creation of low-rent housing does not violate equal protection requirements. And it is not violative of the Equal Protection Clause for a state participating in Medicaid to generally subsidize the medical expenses of needy persons incident to pregnancy and childbirth, but to exclude nontherapeutic abortions for needy persons from funding by limiting the payment of Medicaid benefits for abortions to those that occur during the first trimester of pregnancy and are medically necessary.

Income taxes imposed at progressive or graduated rates, increasing according to the amount of the taxpayer's income, do not deny to taxpayers the equal protection of the laws.

859 Rule permitting classification

Since the establishment of regulations of a particular trade or business essential to the public health and safety is within the legislative capacity of the state in the exercise of its police power, the classification of the subjects of such legislation, so long as it has a reasonable basis and is not merely an arbitrary selection without real difference between the subjects included and those omitted from the law, does not deny to any person the equal protection of the laws. A group of persons with the same occupation or business is not an "independently identifiable" class for purposes of the Equal Protection Clause, and legislation affecting alike all persons pursuing the same business under the same conditions is not class legislation. Classification of employees' occupations by statute may be based not only on the character of the employees, but on the nature of the employment; and a statute dealing with employees in a particular line of business does not effect arbitrary discrimination merely because operation of the statute is not extended to other lines of business having their own circumstances and conditions. But if some persons engaged in a calling or business are subjected to special burdens or favored by special privileges while other persons engaged in the same calling or business are not so treated, the legislation is based upon unconstitutional discrimination.

It is primarily for the state to select the kinds of business which shall be the subject of regulation, and the legislature has wide discretion in doing so; and, as in other cases, legislative discretion in the matter of classification of businesses is not subject to judicial review unless such discretion appears to have been exercised arbitrarily and without any show of good reason. Classifications that distinguish between commercial enterprises and noncommercial enterprises are upheld if they are rationally related to legitimate state interest. And the general rule that the legislature, dealing with practical exigencies and guided by experience, may make classifications without including all cases which it might possibly reach, is free to recognize degrees of harm, and may confine its restrictions to those classes of cases where the need is deemed to be greatest, is applicable to classifications of occupations.

The equal protection of the laws does not mean that all occupations which are called by the same name must be treated in the same way. Any substantial difference between particular businesses may serve as a reasonable basis for a classification and be sufficient. For example, a state may validly distinguish between physicians and non-physicians, and more specifically between ophthalmologists and optometrists. The courts have upheld, as against attacks under the equal protection guarantee, classifications of businesses based upon such factors as location, time, and size (as measured by the numbers of persons employed).

In determining claims of unconstitutional discrimination and the denial of alleged rights, a distinction must be drawn between a lawful business in which a citizen has the right to engage and one in which he or she may engage only as a matter of grace. At the same time, it is to be observed that the requirement of equal protection of the laws applies to regulation of occupations which may be entirely prohibited as well as to those which are inherently lawful.

860 Limitations

Legislation which affects alike all persons pursuing the same business under the same conditions is not such class legislation as is prohibited by constitutional provisions. However, this general rule is limited to the extent that it does not permit discrimination by which persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions. The power of the legislature to impose restrictions on a lawful calling must be exercised so that such restrictions must operate equally upon all persons pursuing the same business or profession under the same circumstances. The constitutionality of a statute cannot be sustained which selects particular individuals from a class or locality and subjects them to peculiar rules or imposes upon them special obligations or burdens from which others in the same locality or class are exempt.

Generally, legislation regulating businesses must be sustained against constitutional challenges under the rational basis test if there is any conceivable basis for the legislature to believe that the means it has selected will tend to accomplish the desired end; even if the court is convinced that the political branch has made an improvident, ill-advised, or unnecessary decision, the court must uphold the act if it bears a rational relation to a legitimate governmental purpose. Any statute which imposes special restrictions or burdens on, or grants special privileges to, certain persons engaged in a business, which burdens or privileges are not imposed on, or granted to, other persons engaged in the same business under the same circumstances, is invalid.

Practice guide: Businesses seeking to challenge the constitutionality of economic regulations must do more than submit evidence which calls the articulated purposes of the legislation into doubt. They must demonstrate that the legislature could not reasonably have believed that the legislation would attain its aims.

A statute may amount to an arbitrary classification denying the equal protection of the laws if it violates a citizen's right to engage in business pursuits for a reason which does not have some relationship to the public need. Hence, if a statute allows one class of persons to engage in what is presumptively a legitimate business while denying such right to others, it must be based upon some principle which may reasonably promote the public health, safety, or welfare.

A statute containing a classification which attempts to give an economic advantage to those engaged in a business at an arbitrary date as against all those who enter the industry after that date is not a regulation of a business in the interest of the public, and, unless otherwise shown to affect the public welfare in a manner which will create some reasonable basis for the distinction, is arbitrary and unreasonable. In order for a statute regulating a business or profession to make distinctions based on time as to the persons to whom it relates, there must be a reasonable basis for the distinctions relating to those engaged in the business at a certain time and those engaged at a later time. Statutes prescribing rules and qualifications for persons who may thereafter seek to engage in occupations subject to the police power which are different from those rules prescribed as to persons already lawfully pursuing such occupations are not void as denying equal protection of the law.

A statute which discriminates against businesses, persons, or establishments already in existence is unreasonable and unconstitutional. The Federal Constitution requires that a state treat those who deal with the Federal Government as well as it treats those with whom it deals itself.

861 Classification among corporations; generally

Corporations as creatures of the law may, within reasonable limits, be divided into classes, and each class given such rights, capacities, and powers as the legislature may see fit. For this reason, a corporation may not necessarily have the right to complain of a discrimination in favor of other classes of corporations or that all or any of the rights of natural persons have not been given to it.

Observation: The Small Business Administration (SBA) and the National Aeronautics and Space Administration (NASA) offering a government contract as a small business set aside are required by the Equal Protection Clause to explain the necessity of offering a contract to disadvantaged small businesses and to explain the past societal disadvantages to be corrected. And the equal protection issue raised by a claim that a training center was subjected to unequal treatment regarding a federal training contract, that was not based on a racial classification or any other type of classification warranting a strict scrutiny analysis, involves the rational relationship standard, and the Equal Protection Clause requires only that the classification bear some rational relationship to legitimate governmental ends.

Generally speaking, the action of the state in so classifying corporations and in conferring different powers upon them is not in contravention of the Fourteenth Amendment of the Federal Constitution. Thus, for example, statutes prohibiting business corporations from engaging in the business of farming or agriculture do not violate the Equal Protection Clause of the federal or state constitutions. And a statute requiring pawnbrokers to maintain certain information that was potentially relevant to the investigation of stolen property by law enforcement officials did not violate the pawnbrokers' equal protection rights, even though banks and other institutions that lent money were not subject to such disclosure requirements, as the legislature could rationally conclude that pawnshops, unlike these other institutions, provided a market for stolen property. In order, however, to justify diversity of treatment of corporations, the classification must be founded on differences either defined by the Constitution or such as are natural or intrinsic and reasonable.

862 Classifications based on minority or female preference or disadvantaged business status

A classification among businesses competing for government contracts that, at least with regard to some contracts, favors so-called disadvantaged businesses or which sets aside a certain number or amount of such contracts for minority-

owned or female-owned businesses may still be permissible in some instances, but such contracts, formerly judged under the rational relationship or intermediate scrutiny tests, must now be judged under the strict scrutiny test and must satisfy some compelling governmental interest in order to be held valid.

Practice guide: When statistical disparity is relied on to justify a race, ethnicity, or gender-based program for awarding government contracts, and special qualifications are necessary to undertake the particular task, the relevant statistical pool used to evaluate the program under the Equal Protection Clause should include only those minorities qualified, willing, and able to provide the requested services. If statistical analysis includes the proper pool of eligible minorities, any resulting disparity may constitute prima facie proof of a pattern or practice of discrimination.

A provision of the Small Business Act authorizing a "set-aside" of government contracts for disadvantaged small businesses does not on its face violate the Equal Protection Clause, since the government has a compelling interest in combating discrimination in government contracts.

Observation: A city may use data describing construction industry discrimination in its metropolitan area rather than just data from the city itself in seeking to justify a minority preference contract scheme being challenged on equal protection grounds; any limitation of such evidence would ignore the economic reality that contracts are often awarded to firms situated in adjacent areas.

863 Classification among corporations and individuals

For many purposes corporations may be put into one classification and individuals into another without violating the constitutional guarantees of equal protection. This principle has been applied in a great variety of factual situations. But corporations may not arbitrarily be selected in order to be subjected to a burden to which individuals would as appropriately be subject. Legislation which is directed solely to corporations or a particular class of corporations and which eliminates from its operation individuals, where there is no basis for such discrimination, is unconstitutional as denying to corporations the equal protection of the laws.

The legislature may impose a different punishment on a corporation for a criminal offense than is imposed on an individual for the same offense if the distinction in punishment is based upon reasonable grounds having a rational relation to the crime and to the nature and condition of the parties; but a statute providing different degrees of punishment for the same act when performed by officers of a particular class of corporations than when performed by other offenders violates a state constitutional requirement of uniformity of operation. A classification which arbitrarily favors a corporation as against an individual is invalid under the Federal Constitution. Usually, however, legislation granting corporations privileges not conferred upon natural persons or subjecting natural persons to different burdens from those to which corporations are subjected has been sustained because of a rational and material basis for the classification.

864 Classification among individuals and partnerships

Subject to the requirement that there must be a proper basis for the classification (that is, a basis bearing a reasonable relationship to the purpose of the classificatory legislation), the legislature may discriminate between individuals and partnerships.

865 Classification of selling; method of selling

A statute that regulates merely the right to sell does not impinge on fundamental rights, and such economic regulation is to be examined under the rational basis standard unless it uses invidious classifications. Regulations, licenses, and taxes imposed upon persons whose business consists of selling merchandise often provide for classifications based upon some factor related to the business' particular kind or technique of selling. It is generally held that such legislation is constitutional if the particular manner of selling so classified is substantially different from other types of selling and forms a rational basis for the legislative distinction, and if all persons so engaged and regulated are treated alike. One such distinction is found in the inherent differences between wholesale and retail dealers. The difference between regular dealers or merchants and transients -- such as peddlers, hawkers, and itinerant vendors -- is likewise a reasonable basis for classification. Similarly, an occupational tax law which differentiates between sales for cash and sales made under conditional sales contracts or on credit, imposing the occupation tax only upon the sales for cash, has been held to be valid. And the separate classification for purposes of license tax regulations of establishments selling nonintoxicating beverages to be consumed on the premises where sold, and of those selling them not to be consumed on the premises where sold, has been held to be legitimate and proper. It has also been held that the imposing of a greater license fee upon those conducting fire sales than upon others selling the same kind of goods is not discriminatory or arbitrary.

On the other hand, legislation which attempts to regulate or tax particular businesses, chiefly the selling of various kinds of merchandise, not on a basis that a different kind of selling is employed in one field of endeavor from that employed

in another, but solely on the theory that in the same kind of selling different methods are used, is generally held to be unconstitutional and discriminatory. Such a classification in reality attempts to treat differently persons in the same position, being based upon a subclassification which is unreasonable.

State fair trade laws and an unfair sales act (prohibiting sales below cost) have been held not to violate the Equal Protection Clause.

866 Articles sold

Statutes which in the exercise of the police power impose restrictions or limitations on sales of a particular commodity or on all sales under certain circumstances which call for special regulation are generally upheld as valid and as not amounting to a denial of the equal protection of the laws. The sales so classified cover a wide variety of transactions. Such laws place under the same restrictions and subject to like penalties and burdens all who manufacture or sell the articles embraced by their prohibitions, thus recognizing and preserving the principle of equality among those engaged in the same business.

Equal protection of the laws is not denied by a municipal ordinance which, in prohibiting the sale, offering or exposing for sale, or soliciting to purchase, any articles on any street, alley, or public place in certain defined districts, makes an exception for daily newspapers.

867 Classification of business pursuits of a hazardous character

An occupation that is dangerous to the public health or safety may be classified for regulatory purposes; and an act regulating such an occupation is not unconstitutional for failing to include other occupations that are equally dangerous. The fact that legislative exercise of the police power applies alike to all persons and all corporations engaging in a dangerous or hazardous calling or business relieves such legislation from the charge that there is a denial of equal protection under the law by reason of such enactments. Moreover, in such cases if the power to classify because of the nature of the employment exists, the classification is not rendered invalid because it happens to include some persons not subject to a uniform degree of danger.

868 Classification of businesses employing particular numbers of persons

Classification of businesses in various regulations has often been sustained on the basis of the number of persons employed, where such basis is not arbitrary or unreasonable. Workers' compensation statutes containing a provision that the law shall be inapplicable to employees of employers having less than a specified number of employees have been upheld. Similar classifications affecting the financial responsibility of employers in social legislation relating to unemployment have also been sustained.

Observation: It may be noted that Title VII of the Civil Rights Act of 1964, barring certain forms of discrimination in employment, applies only to employers with 15 or more employees.

869 Generally; constitutional provisions

The theory underlying constitutional requirements of equality is that all persons in like circumstances and like conditions must be treated alike, both as to privileges conferred and as to liabilities or burdens imposed. The organic principle of equality includes within its application a granted privilege as well as a regulated right. Equality of benefit is required no less than equality of burden.

Every citizen should share the common benefits of a government the common burdens of which he or she is required to bear. Thus, legislation granting special privileges and imposing special burdens may conflict with the Equal Protection Clause of the Federal Constitution, as well as with the more specific provisions of some state constitutions, which, although varying slightly in terminology, have the general effect of prohibiting the granting of special privileges or immunities. So long as all are treated alike under like circumstances, however, neither the federal nor the state provisions are violated. General rules that apply evenhandedly to all persons within a jurisdiction comply with the Equal Protection Clause; only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether equal protection is violated arise. It would thus appear that particular laws granting special privileges and immunities must run the gauntlet between the provisions of the Federal Constitution which secure the equal protection of the laws and those of state constitutions which prohibit either special legislation or special laws granting privileges and immunities, and also that the inherent limitations on legislative power may themselves be sufficient to nullify such laws.

870 State constitutional provisions as to special privileges

Provisions to be found in the constitutions of many states have the general effect of prohibiting the grant of special privileges or immunities. Such guarantees in the state constitutions are in nature simply a protection of those fundamental or inherent rights which are common to all citizens; they have been described as being the antithesis of the Fourteenth

Amendment, since the latter operates to prevent abridgment by the states of the constitutional rights of citizens of the United States and the former prevents the state from granting special privileges or immunities and exemptions from otherwise common burdens. One prevents the curtailment of the constitutional rights of citizens, and the other prohibits the enlargement of the rights of some in discrimination against others. However, the tests as to the granting of special privileges and immunities by a state are substantially similar to those used in determining whether the equal protection of the laws has been denied by a state.

The general principle involved in constitutional equality guarantees forbidding special privileges or immunities seems to be that if legislation, without good reason and just basis, imposes a burden on one class which is not imposed on others in like circumstances or engaged in the same business, it is a denial of the equal protection of the laws to those subject to the burden and a grant of an immunity to those not subject to it. Such provisions of the state constitutions permit classification, if it is not arbitrary, is reasonable, and has a substantial basis and a proper relation to the objects sought to be accomplished. And a state constitutional provision that no member of the state shall be deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his or her peers, prohibits class legislation, but does not forbid classification so long as it is not unreasonable or arbitrary.

Observation: In determining the scope of the class singled out by a statute for special burdens or benefits, a court will not confine its view to the terms of the specific statute, but will judge its operation against the background of other legislative, administrative, and judicial directives which govern the legal rights of similarly situated persons. A constitutional provision prohibiting the grant of special privileges applies to municipal ordinances as well as to acts of the legislature.

If a state constitutional provision states that no special privileges or immunities shall ever be granted to any citizen or class of citizens which shall not be granted upon the same terms to all citizens, it is not available to aliens who are not citizens.

871 Imposition of burdens

In the exercise of the undoubted right of classification, it may often happen that some classes are subjected to regulations and some individuals are burdened with obligations which do not rest on other classes or other individuals not similarly situated, but this fact does not necessarily vitiate a statute, because it would practically defeat legislation if it were laid down as an invariable rule that a statute is void if it does not bring all within its scope or subject all to the same burdens. Thus, it is of the essence of a classification that on one class are cast duties and burdens different from those resting on the general public and that the very idea of classification is that of inequality, so that the mere fact of inequality in no manner determines the matter of constitutionality. The general rule as to classification in the imposition of burdens is that no one may be subject to any greater burdens and charges than are imposed on others in the same calling or condition. No burden can be imposed on one class of persons, natural or artificial, and arbitrarily selected, which is not in like conditions imposed on all other classes.

A statute infringes the constitutional guarantee of equal protection if it singles out for discriminatory legislation particular individuals not forming an appropriate class and imposes on them burdens or obligations or subjects them to rules from which others are exempt. Under the guise of the exercise of the police power, it is not competent either for the legislature or for a municipality to impose unequal burdens upon individual citizens.

Observation: If a legislative classification or distinction neither burdens a fundamental right nor targets a suspect class, the United States Supreme Court will uphold it against an equal protection challenge so long as it bears a rational relation to some legitimate end. Thus, if, under a particular classification, all persons affected by a statute are treated alike in the burdens imposed upon them, the legislation is not open to the objection that it denies to any the equal protection of the laws.

872 Special burdens or liabilities

Special burdens are often necessary for general benefits, such as for supplying water, preventing fire, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another; they are designed not to impose unequal or unnecessary restrictions upon anyone, but to promote with as little individual inconvenience as possible the general good.

873 Grant of privileges

Without violating the limitations inherent in the constitutional requirements as to the equal protection of the laws, appropriate classifications may be made. When made on natural and reasonable grounds, the grant of rights to one class will not necessarily amount to a denial of the equal protection of the laws to members of other classes. In all cases,

however, where a classification is made for the purpose of conferring a special privilege on a class, there must be some good and valid reason why that particular class should alone be the recipient of the benefit. Under the Federal Constitution, distinctions in rights and privileges that are based on some reason not applicable to all are generally sustained. But if there are other general classes situated in all respects like the class benefited by a statute, with the same inherent needs and qualities which indicate the necessity or expediency of protection for the favored class, and legislation discriminates against, casts a burden upon, or withholds the same protection from the other class or classes in like situations, the statute cannot stand.

An otherwise valid statute or ordinance conferring a privilege is not rendered invalid merely because it chances that particular persons find it hard or even impossible to comply with precedent conditions upon which enjoyment of the privilege is made to depend.

874 Generally

In general, every special or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens and not of others, when there is no public necessity for such discrimination, is unconstitutional and void.

A statute is "local" for purposes of such a constitutional provision if the class is so unnatural in formation that only by the rarest coincidence can it be viewed to include more than one locality, or at best but two or three, and these things are either apparent on the face of the statute or judicial notice may be taken of them. That a statute is expressed in general terms is not, and should not be, decisive of the question of its validity under a state constitutional provision against special legislation.

875 Effect of Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment is not necessarily infringed by special legislation. It does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such special legislation shall be treated alike under like circumstances and conditions. The Federal Constitution does not prohibit special laws inflexibly and always; it permits them when there are special evils with which existing general laws are incompetent to cope.

876 Generally

Equal protection of the laws of a state is extended to persons within its jurisdiction, within the meaning of the Fourteenth Amendment, when its courts are open to them on the same conditions as to others in like circumstances, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts. The Supreme Court at an early date recognized the rule that an act of the legislature which in terms would give to one individual certain rights and the benefit of certain modes of procedure, and would deny to another similarly situated the same rights, could be challenged successfully on the ground of unjust discrimination and denial of the equal protection of the laws. Depriving a nonresident of the right to sue and defend in the courts of a state upon the same terms of equality with residents of the state in respect of the measure of damages enforced in similar causes of action and like circumstances is a denial of equal protection. However, it is not a denial of equal protection to deny a forum to a plaintiff who is unable to articulate a cause of action.

The Fourteenth Amendment was not intended to deprive the states of their power to establish and regulate judicial proceedings, and its provisions therefore only restrain acts which so transcend the limits of classification as to cause them to conflict with the fundamental conceptions of just and equal legislation. The equal protection of the laws guaranteed by this amendment in respect of legal proceedings does not require that every person in the land shall possess the same rights and privileges as every other person, and hence does not forbid proper and reasonable classifications in the field of court proceedings. This amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies.

By federal statute, all persons within the jurisdiction of the United States have the same right in every state and territory to sue, be parties, and give evidence. This statute applies also to aliens.

877 Jurisdiction; venue

The Equal Protection Clause of the Fourteenth Amendment is not violated by any diversity in the jurisdiction of the several courts of a state as to subject matter, amount, or finality of decision, if all persons within the territorial limits of the respective jurisdictions of such courts have an equal right, in like cases and under like circumstances, to resort to them for redress. Each state has the right to make political subdivisions of its territory for municipal purposes and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities

and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a state to regulate its internal affairs to deny to it this right.

The constitutional principle of equality before the law is not violated by a refusal to exercise jurisdiction on the ground that another court would be a more convenient forum to try the case. The legislature has discretion to fix the venue of civil actions as long as it does not transgress fundamental guarantees of equal protection of the laws and does not arbitrarily and unreasonably discriminate against particular persons.

Since it is fundamental rights which the Fourteenth Amendment safeguards, and not the mere forum which a state may deem proper to designate for the enforcement and protection of such rights, given a condition where fundamental rights are equally protected and preserved, rights which are thus protected and preserved are not denied because the state has deemed it best to provide for a trial in one forum or another; it is not the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail.

878 Conditions precedent to suit

The Fourteenth Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of the distinction is real and the condition imposed has a reasonable relation to a legitimate object. Reasonable classifications as to the residence prerequisite to the maintenance of certain types of litigation do not violate the Constitution. And where a right of action did not exist at common law but is statutory in origin, the right may be granted upon such conditions as the legislature, in its wisdom, sees fit to impose.

879 Procedure, generally

It is a general rule that equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected, if such a course would also be applied to any other person in the state under similar circumstances and conditions. Furthermore, the Equal Protection Clause does not exact uniformity of procedure; the legislature may classify litigation and adopt one type of procedure for one class and a different type for another, so long as the classification meets the test of reasonableness. Incidental individual inequality resulting from the operation of a rule of court does not make it offensive to the Fourteenth Amendment. The legislature may even prescribe novel and unprecedented methods of procedure, provided they afford the parties affected substantial security against arbitrary and unjust spoliation. For example, the Equal Protection Clause is not violated by proposed legislation mandating a stay of a civil tort action brought by a defendant in a sexual assault case against a victim pending resolution of the criminal action, where the bill would otherwise allow the action to proceed if the delay would be prejudicial. And a state statute classifying some tenants of real property differently from other tenants for purposes of possessory actions will offend the equal protection safeguard only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective or if the objective itself is beyond the state's power to achieve.

880 Statutes of limitations, generally

As a general rule, the Equal Protection Clause is not offended by statutes that assign differing time periods within which various causes of action may be brought, or that assign differing time periods depending on the legal nature of the defendants involved, unless the time periods are unreasonable or discriminatory. For example, the Equal Protection Clause is not violated by a state statute providing that all suits upon foreign judgments shall be brought within five years after such judgment shall have been obtained, where the statute has been construed by the state courts as barring suits on foreign judgments only if a plaintiff cannot revive his or her judgment in the state where it was originally obtained, and the relevant date in applying the statute is not the date of the original judgment, but rather the date of the latest revival of the judgment. A statute requiring tort claims against the state to be filed within 120 days does not establish a suspect classification, does not discriminate against one class, and does not infringe upon any fundamental right.

Observation: The rational basis standard, or reasonable basis test, is applied to equal protection challenges to laws which result in a shorter statute of limitations or a shorter notice of claim period for a certain nonsuspect class of citizens.

881 Process

A statute providing for a different method of service of process on ordinary domestic corporations as against specially chartered corporations is not an unlawful discrimination in violation of the Equal Protection Clause. A statute tolling the limitation period for an action against a foreign corporation that is not represented in the state by any person or officer on whom process may be served does not violate equal protection, notwithstanding the enactment of a long-arm statute, especially as the institution of long-arm jurisdiction has not made service on an unrepresented foreign corporation the

equivalent of service on a corporation with an in-state representative. And statutes providing for service upon the Secretary of State in actions against nonresidents engaged in business or a business venture within the state have been held not to violate the Equal Protection Clause. A state rule of civil procedure which requires that a person served with process outside the state must be served with a copy of the complaint and a copy of the summons, while only requiring a copy of the summons to be served upon those served within the state, is not a denial of equal protection of the laws. A statute providing for service of process in summary eviction proceedings on natural persons to be accomplished in one of three ways -- namely, personal service, substituted service, or conspicuous service -- with a further proviso that if either the substituted or conspicuous methods of service are used, a copy of the notice and petition must be mailed to the person within one day after delivery or affixing, is not in violation of the Equal Protection Clause. Residents and nonresidents of a state may be placed into distinct classes for the purpose of the process of attachment.

882 Evidence; statutory presumptions

A legislature may, without violating the Equal Protection Clause, make applicable to a particular proceeding a rule of evidence which is inapplicable to other proceedings, as long as the legislation meets the test of reasonableness. Thus, a state's rape shield statute does not violate the Equal Protection Clause by distinguishing between rape defendants and other criminal defendants in the admission of evidence. Generally, it is competent for a legislative body to provide by statute or ordinance that certain facts shall be prima facie or presumptive evidence of other facts. That a legislative presumption of one fact from evidence of another may not constitute a denial of the equal protection of the law; it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of the legislature to amass the stuff of actual experience and cull conclusions from it. Thus, a legislature may stipulate that the fact of an injury, under certain circumstances, is prima facie evidence of negligence, and such legislation has been upheld as against the contention that it is unconstitutional as a denial of the equal protection of the laws. Similarly, statutes creating a presumption of fraud under certain circumstances have generally been held to be valid if the inference is not merely arbitrary and there is a rational relationship between the facts of which the proof of one is made prima facie evidence of the other. On the other hand, the Equal Protection Clause is violated by a state's statutory procedure whereby an unwed father is presumed to be unfit to raise his illegitimate children upon their mother's death, and may be deprived of the custody of his children, without a hearing as to his fitness, by the state's institution of dependency proceedings to declare the children wards of the state and to place them in guardianship, whereas a hearing is extended to all other parents whose custody of their children is challenged. And a statutory presumption that the mere possession of a firearm by an unnaturalized foreign-born person was for an unlawful purpose has been held to deny the defendant equal protection.

In determining the constitutionality of a statutory presumption of dependency, the question is not whether the presumption is required, but whether it is permitted, and the court's role is not to hypothesize independently on the desirability or feasibility of any possible alternative basis for the presumption.

883 Remedies; defenses

The fact that litigants are required to follow the remedies provided by law does not amount to a denial of equal protection of the laws. Nor is equal protection necessarily denied by a statutory classification affecting remedies. Thus, no constitutional defect inheres in a classification of remedies which provides a uniform, although special and summary, proceeding for a quick determination of questions, and that is based upon a natural and reasonable distinction between cases requiring a prompt hearing and a particular form of judgment and ordinary cases at law or in equity.

The Fourteenth Amendment to the Federal Constitution does not force the state to accept particular modern doctrines of equity, to adopt a combined system of law and equity procedure, to dispense with all necessity for form and method in pleading, or to give untrammeled liberty to make amendments. The legislative discretion to grant or withhold equitable relief in any class of cases must, however, under the equal protection of the laws clause, be so exercised as not to grant equitable relief to one and to deny it to others under like circumstances and in the same territorial jurisdiction.

If conduct against which a statute forbids injunctions is in and of itself lawful and authorized by statute, there is no denial of the equal protection of the laws in such statute forbidding injunctions, because no one has in the first instance a constitutional right to a "remedy" against conduct of another person which is lawful.

A state survival statute providing for the survival of all actions beyond the death of the injured party except for libel or slander actions creates an arbitrary distinction serving no function of a survival statute or of the law of defamation, and

is unconstitutional. Statutes providing for different remedies with respect to the garnishment of wages of state employees as compared with other employees, or of persons who incur debts for the common necessaries of life as compared with those who incur other types of debts, and statutes providing distinctions between the attachment of property belonging to residents as compared with nonresidents, have been held not to constitute a denial of equal protection.

Legislation affecting defenses has frequently been sustained as against attack under the Equal Protection Clause.

884 Decisions and rulings

The limitations inherent in the requirement of equal protection of the law extend to the judicial, as well as to the political branches of the government, so that a judgment may not be rendered in violation of such constitutional limitations and guarantee. However, requiring an affirmative vote of a majority of circuit judges in regular active service as a prerequisite to granting a rehearing en banc, even though most judges have recused themselves, does not violate the Equal Protection Clause. And the rule is well settled that the Equal Protection Clause does not assure uniformity of judicial decisions or immunity from judicial error. Thus, the fact that a court departs from the precedent established by its earlier decisions does not deprive the complaining party of equal protection. From what has been said it follows a fortiori that the Fourteenth Amendment does not require uniformity in the decisions of the courts of different states.

The fact that one loses his or her case does not show a denial of equal protection of the laws. And it is not an equal protection violation for a state court to dismiss a ß 1983 claim of a dilatory litigant.

885 Damages; costs

Statutes providing for double or treble punitive damages have been held not to deny equal protection of the laws. And a statute providing for recovery of special damages only for libel in newspapers or slander by radio unless a correction is requested and refused has been held not violative of equal protection in granting to newspapers and radio stations privileges denied to others. Statutes limiting the amount of damages recoverable in wrongful death actions have also been sustained. Thus, the Equal Protection Clause is not violated by state statutes which deny punitive damages in wrongful death cases, but allow such damages in other personal injury actions. However, a statutory cap on noneconomic damages in common-law actions for death, bodily injury, and property damage has been held to violate the special legislation clause of a state constitution as arbitrary and not rationally related to the legitimate government interest in reducing systemic costs of tort liability.

Numerous cases sustain the validity of legislation authorizing the allowance of attorneys' fees as a part of the costs recoverable by the successful party litigant in particular classes of actions, as against the contention that the statutes violate constitutional provisions guaranteeing equal protection of the laws; but some courts have held that singling out a particular class of suitors for special benefits or designated classes of defendants for particular liabilities is a denial of equal protection, and in other cases denial of equal protection is found to arise from discrimination in favor of successful plaintiffs, as to whom provision for an allowance is made, as against successful defendants in whose behalf there is no corresponding provision for the allowance of attorneys' fees as a reward for resisting an unsuccessful and therefore presumably unjust claim. Statutes imposing costs on the prosecuting witness, under certain circumstances, on failure of the prosecution, and authorizing his imprisonment until they are paid, generally have been upheld as constitutional when challenged as denying the prosecuting witness the equal protection of the laws. However, the equal protection guarantees of the Fourteenth Amendment are violated by a state statute which requires cost bonds from litigants against the state, but not from litigants against private parties.

886 Appeals, generally

It is part of the general rule relating to the application of the Equal Protection Clause of the Fourteenth Amendment to legislation which classifies in fixing the jurisdiction of courts that among the matters in which diversity may validly be effected is diversity respecting the finality of decision. Thus, the equal protection of the laws is not denied by a state statute which establishes a separate appellate court for certain counties, with exclusive final appellate jurisdiction in certain cases which, if arising in the courts of other counties, would be appealable to the highest state court. Moreover, the Equal Protection Clause does not require an appeal in a particular type of proceeding or in some particular situation if all persons within a class are treated alike, although an appeal may be allowed to persons differently situated. And reasonable procedural provisions to safeguard litigated property or to discourage patently insubstantial appeals will not be questioned under the Equal Protection Clause if these rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied. A state law is not capricious or arbitrary, so as to violate the Equal Protection Clause, in requiring payment of a specified appellate court filing fee, without regard to the ability to pay, except in allowing in forma pauperis criminal appeals, habeas corpus petitions from state institutions or civil commitment proceedings, and appeals from terminations of parental rights.

The Federal Constitution does not require a state to adopt a unifying method of appeals which will ensure to all litigants within the state the same decisions on particular questions which may arise.

Although a state is not constitutionally required to provide a system of appellate review, once an appeal is afforded, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. Requiring one seeking to obtain a review of a state trial court's domestic abuse prevention order to seek relief from a single justice of the state supreme court, and then, if necessary, from the full court on appeal, does not deny equal protection of the laws. The grant of a right of appeal to one litigant with an accompanying failure to make the same grant to the other is discriminatory and is a violation of both the federal and state constitutions. Thus, a state statute requiring tenants appealing evictions to post a bond in an amount twice the rental value of the premises is unconstitutional as violative of equal protection, where other appellants in the state are not subjected to such a double-bond requirement. Similarly, a provision of the Perishable Agricultural Commodities Act of 1930, requiring a double bond to effectuate an appeal to the District Court from a reparations award entered by the Secretary of Agriculture in favor of a farmer, has been held to constitute a denial of equal protection where the automatic doubling of the amount of the reparation award bore no rational relationship to the purpose of the legislation, which was to guarantee the farmer payment of interest and the cost of appeal.

887 Criminal cases

Under the Fourteenth Amendment, a state is not obliged to provide an appeal for criminal defendants. However, the Equal Protection Clause requires that, once a state establishes avenues of appellate review, those avenues must be kept free of unreasoned distinctions that can only impede the open and equal access to the courts.

888 Generally

One purpose of the Equal Protection Clause is to protect every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents. Thus, the guarantee of equal protection applies not only to facial legislative classifications, but also to the administration of laws as well. Equal protection can be violated by discriminatory administration of a law impartial on its face. The Constitution not only forbids discriminatory laws making distinctions without a rational basis, but it also forbids the discriminatory and selective enforcement of nondiscriminatory laws. The validity of a state statute under the Equal Protection Clause therefore often depends on how it is construed and applied. Whether a statute or regulation valid on its face has been applied in a discriminatory manner is a factual question. The Supreme Court has stated that a determination of this question is not confined to the language of the statute under challenge in determining whether that statute has any discriminatory effect; just as a statute nondiscriminatory on its face may be grossly discriminatory in its operation, so may a statute discriminatory on its face be nondiscriminatory in its operation.

Although as a general rule a law cannot be held unconstitutional merely because it is unfaithfully administered by those who are charged with its execution, even though its just interpretation is consistent with the Constitution, at least in the absence of an element of intentional or purposeful discrimination, a provision not objectionable on its face may be adjudged unconstitutional because of its effect and operation. A law, though fair on its face and impartial in appearance, which is of such a nature that it may be applied and administered with an evil eye and unequal hand so as to make it unjust and illegal discrimination is, when so applied and administered, within the prohibition of the Federal Constitution.[n75] Hence, in a consideration of the classification embodied in a statute, regard should be given not only to its final purpose, but likewise to the means provided for its administration. For example, it is a denial of equal protection of the law to make the execution of a statute dependent on the unbridled discretion of a single individual or an unduly limited group of individuals. The mere possibility of arbitrary action, where discretion is vested in an administrative agency, does not render a statute vulnerable to the charge that it denies equal protection of the laws. Discriminatory enforcement of criminal laws is treated in another article. Also discussed elsewhere are discriminatory enforcement or administration of particular laws, such as, for example, tax laws and zoning regulations.

889 What constitutes selective enforcement or discriminatory administration

Selective enforcement of a facially constitutional law or regulation does not, by itself, violate the Equal Protection Clause. For example, certain violators may be selected for prosecution out of a class of all known violators, without violating the Equal Protection Clause, as the result of limited manpower or resources, in order to bring an appropriate case to test a new regulation or statute, or in view of an enforcement strategy directed only at serious violators. Demonstration of different treatment from persons similarly situated, without more, does not establish malice or bad faith, for purposes of a claim for equal protection violation based on selective treatment not relating to race, religion, or any intentional effort to punish a person for exercising his constitutional rights. A violation of equal protection by selective

enforcement does arise, however, if a person, compared with others similarly situated, is selectively treated, if such selective treatment is based on impermissible considerations such as race, religion, or intent to inhibit or punish the exercise of constitutional rights, or if such selective treatment is based on a malicious or bad faith intent to injure a person. Selective prosecution, if based upon improper motives, can also violate equal protection. Thus, a statute may be held constitutionally invalid as applied, when it operates to deprive an individual of a protected right, although its general validity as a measure enacted in the legitimate exercise of state power is beyond question. A state also may not selectively deny protective services to certain disfavored minorities without violating the Equal Protection Clause. Selective prosecution involving failure to prosecute all known lawbreakers, due either to ineptitude or lack of resources, resulting in people who are equally guilty of crimes or other violations receiving unequal treatment, is not a violation of equal protection; however, selective prosecution, where the decision to prosecute is made either in retaliation for the exercise of a constitutional right, such as the right to free speech or the free exercise of religion, or because of membership in a vulnerable group, is actionable under the Equal Protection Clause.

Mere errors of judgment by officials will not support a claim of discrimination violative of constitutional guarantees of equality. Moreover, it is not enough to show that a law or ordinance has not been enforced against other persons as it is sought to be enforced against the person claiming discrimination. Even if the enforcement of a particular law is selective, it does not necessarily follow that it is unconstitutionally discriminatory; selective enforcement may be justified when (1) the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity, or (2) a striking example or a few examples are sought in order to deter other violators, as part of a bona fide rational pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary.

It is only when the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, that a constitutional violation may be found. Mere laxity in the administration of the law, no matter how long continued, is not and cannot be held to be a denial of the equal protection. To establish arbitrary discrimination inimical to constitutional equality, there must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. Thus, the Supreme Court has stated that the unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination, which may appear on the face of the action taken with respect to a particular class of persons, or may be shown by extrinsic evidence establishing a discriminatory design to favor one individual or class over another, not to be inferred from the action itself. But a discriminatory purpose is not presumed; there must be a showing of clear and intentional discrimination. Thus, under the Equal Protection Clause, the government may not grant the use of a forum to people whose views it finds acceptable, but deny its use to those wishing to express less favored or more controversial views, and it may not select which issues are worth discussing or debating in public facilities; the government must afford all points of view an equal opportunity to be heard, and not make selective exclusions from a public forum on the basis of content alone or by reference to content alone.

890 Generally; constitutional provisions

The guarantee of due process found in the Fifth Amendment of the Federal Constitution declares that no person shall "be deprived of life, liberty, or property without due process of law." The Fourteenth Amendment declares that no state shall "deprive any person of life, liberty, or property without due process of law," and is a limitation only upon the powers of the states.

Practice guide: The mere deprivation by state action of a constitutionally protected interest is not in itself unconstitutional. What is unconstitutional is the deprivation of such an interest without due process of law. The cornerstone of due process is the prevention of abusive governmental power, and to prove a due process claim, the plaintiff must show that it was deprived of a protected interest without due process of law. To determine the process due in connection with deprivation of a protected interest, a court will consider the private and governmental interests at stake and the value of additional or different procedures.

The due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action. The restraint imposed upon legislation by the Due Process Clauses of the Fifth and Fourteenth Amendments is the same; the Due Process Clause of the Fourteenth Amendment imposes no more stringent requirements upon state officials than does the Due Process Clause of the Fifth Amendment upon their federal counterparts.

A state adopting the language of the Fourteenth Amendment to the Federal Constitution in its own Bill of Rights adopts with it the interpretation it has received. Where the Due Process Clause of a state constitution is not more restrictive than the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, the decision of a case under the Fourteenth Amendment will also dispose of questions raised under the state constitution.

The guarantee of due process has been invoked in a large number of situations. Many of these involve matters which are the subject of separate articles. The detailed discussion and application of the due process guarantee, as it relates to these particular subjects, is left for those articles. The present article will discuss only the basic rules governing the guarantee.

891 Origin of guarantee

Although the Fifth Amendment to the United States Constitution is the first instance in which a written constitution limited the powers of government by declaring that no person shall be deprived of life, liberty, or property without due process of law, the principle that no person should be deprived of life, liberty, or property except by due process of law did not originate in the American system of constitutional law, but was contained in the Magna Carta as a part of ancient English liberties. Chapter 39 of the Magna Carta, confirmed on the 19th day of June, 1215, declared: "No freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land." This has been a fundamental rule in the judicial system of every state in the Union which adopted the common law.

Observation: Among the historic liberties protected by due process under the United States Constitution is the right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.

892 Common law and fundamental rights

The Due Process Clauses provide heightened protection against government interference with certain fundamental rights and liberty interests. Rights are "fundamental," requiring a governmental regulation infringing those rights to be narrowly tailored to serve a compelling state interest, when they are implicit in the concept of ordered liberty, or deeply rooted in the nation's history and tradition. Choices about marriage, family life, and the upbringing of children are among the associational rights ranked as of basic importance in our society, and are rights sheltered by the Fourteenth Amendment against the state's unwarranted usurpation, disregard, or disrespect. But the Due Process Clause is not a guarantee, for instance, against incorrect or ill-advised personnel decisions.

The common law is the foundation of that which is designated as due process of law. Traditional practice under the common law provides a touchstone for analysis, under the Due Process Clause of the Fourteenth Amendment, of a state's abrogation of common-law procedures, but not all deviations from established common-law procedures result in some constitutional infirmity under the Due Process Clause, since to hold all procedural changes unconstitutional would be to deny every quality of the law but its age and to render it incapable of progress or improvement.

Observation: Common-law rights are not the equivalent of fundamental rights, which are created only by the Federal Constitution itself and are protected by substantive due process. Common-law rights are protected only by procedural due process.

893 Role of Congress

The Fifth Amendment is a limitation upon the powers of Congress only. The guarantee of due process bars Congress from enactments that "shock the sense of fair play." The due process clauses of the federal and many state constitutions guarantee appropriate procedural protections and place some substantive limitations on legislative measures. However, under the Fifth Amendment's Due Process Clause, Congress is free to adjust the burdens and benefits of economic life, as long as it does so in a manner that is neither arbitrary nor irrational. Congress also has broad discretion to legislate to enforce the core promises of the Fourteenth Amendment. An explicit declaration by Congress that legislation is being passed to enforce the Fourteenth Amendment is the simplest way to meet the first requirement for determining whether the legislation is a valid exercise of Congress' power. If Congress does not explicitly identify the source of its power as the Fourteenth Amendment when enacting legislation, there must be something about the legislation connecting it to recognized Fourteenth Amendment aims.

The principles embodied in the Fifth Amendment's Due Process Clause have been held not to be coextensive with the prohibitions existing against state impairment of pre-existing contracts, and the standards imposed on congressional economic legislation by the Due Process Clauses are less searching. Thus, economic legislation, enacted under Congress' Commerce Clause power, is entitled to the most deferential level of judicial scrutiny, and, where the legislation is purely economic and does not abridge fundamental rights, the challenger must show that Congress acted in an arbitrary

and irrational way in enacting it; in other words, as long as the state's objective is legitimate and the taxonomy adopted is rationally related to achieving that objective, then the law does not transgress due process.

894 Due process as federal or state question

Even though state law plays a role in determining the existence of property or liberty interests which are protected by the Due Process Clause, the ultimate question of the degree of due process protection to be afforded under the Due Process Clause remains a federal one, for the Due Process Clause does not require a state to implement its own law correctly, nor does the Constitution insist that local government be right. If state law grants more procedural rights than the Federal Constitution would otherwise require, the state's failure to abide by that law is not a federal due process issue. Converting alleged violations of state law into federal due process claims improperly bootstraps state law into the Federal Constitution.

Observation: A rational basis review under the Due Process Clause does not authorize the federal judiciary to sit as a superlegislature to judge the wisdom or desirability of state legislative policy determinations.

895 Generally

The guarantee of due process of law is one of the most important to be found in the Federal Constitution or any of the amendments thereto; it has been described as the very essence of a scheme of ordered justice. The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than a mere absence of physical restraint. For instance, the right to hold a specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the liberty and property concepts of the Fifth Amendment. And due process requires that matters have sufficient contacts with a state in order for that state's laws to be applied; the parties' consent to apply the law of a particular forum state is not sufficient, standing alone.

Due process of law is the primary and indispensable foundation of individual freedoms; it is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. The fundamental guarantee of due process is absolute, and not merely relative. It does not have regard merely to enforcement of the law, but searches also the authority for making the law, and it is not merely a political right, but is a legal right assertable in the courts. By reason of this guarantee, everyone is entitled to the protection of those fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions and that have long been recognized under the common-law system, and which are not infrequently designated as the "law of the land."

A state's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the state owes to each individual that process which, in light of the values of a free society, can be characterized as due. The question as to what constitutes due process of law is purely juristic and is beyond the scope of legislative competence. In evaluating a due process claim, a court must determine whether a property or liberty interest exists and, if so, what procedures are constitutionally required to protect that right.

Observation: When a particular Bill of Rights provision has been made applicable to the states by the Fourteenth Amendment, and provides an explicit textual source of constitutional protection against a particular sort of government behavior, that amendment and not some more generalized notion of substantive due process must be the guide for analyzing claims.

896 Definition; difficulty of definition

The difficulty of defining the phrase "due process of law" has been repeatedly recognized. It would be very difficult, if not impossible, to frame a definition of the term which would be accurate, complete, and appropriate under all circumstances.

Due process expresses a requirement of fundamental fairness. Applying the Due Process Clause is an uncertain enterprise which must discover what fundamental fairness consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Observation: That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, and thus violative of due process, may, in other circumstances and in the light of other considerations, fall short of such denial.

The United States Supreme Court has never attempted to define with precision the words "due process of law," and in fact the phrase probably never can be defined so as to draw a clear and distinct line, applicable to all cases, between proceedings which constitute due process of law and those which do not.

The term "due process of law" asserts a fundamental principle of justice, rather than a specific rule of law, and thus is not susceptible of more than a general statement of its intent and meaning, which are ascertained in the history of its specific applications to cases requiring judicial decisions. The primary guide in determining whether a principle is a fundamental principle of justice protected by the Due Process Clause is historical practice. The rule that what free people have found consistent with their enjoyment of freedom for centuries is not to be deemed to violate due process does not freeze due process within the confines of historical facts or discredited attitudes, it being of the very nature of a free society to advance in its standards of what is deemed reasonable and right. [n58] The courts usually have contented themselves, in ascertaining the intent and application of this important phrase, with the process of judicial inclusion and exclusion as the cases presented for decision have arisen. The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn, but to recognize that it is for the court to draw it by the gradual and empiric process of inclusion and exclusion. Due process is an elusive concept; its exact boundaries are undefinable, and its content varies according to specific factual contexts. The doctrine of a particular case is not allowed to end with its enunciation, and an expression in an opinion yields later to the impact of facts unforeseen. Thus, what is due process depends on circumstances varying with the subject matter and the necessities of the situation. The content of due process is a function of many variables, including the nature of the right affected, the degree of danger caused by the proscribed condition or activity, and the availability of prompt remedial measures. It also depends, to some extent, on which powers of government are being exercised and the purposes to be accomplished.

The Constitution does not declare what principles are to be applied to ascertain whether there has been due process of law. No single model of procedural fairness, let alone particular form of procedure, is dictated by the Due Process Clause. Thus, "due process" is not a technical conception with a fixed content unrelated to time, place, and circumstances. Representing a profound attitude of fairness, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith. It is not an inflexible procedure universally applicable to every imaginable situation. Instead, due process is flexible and calls for such procedural protections as the particular situation demands. Due process is not so rigid as to require that the significant interest in informality, flexibility, and economy must always be sacrificed. In other words, due process requires more as the stakes, and therefore the costs of error, rise.

897 Particular judicially stated definitions

While it is true that no precise definition of the phrase "due process of law" can be given, the courts have frequently defined the phrase in general terms. Due process of law must be understood to mean law in the regular course of administration through the courts of justice, and according to those rules and forms which have been established for the protection of private rights. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which are so rooted in the traditions and conscience of our people as to be ranked as fundamental, or are implicit in the concept of ordered liberty.

In its broadest sense, due process means that every citizen shall hold his or her life, liberty, property, and immunities under the protection of the general rules which govern society. Due process protects the right to make an effective case against deprivation by the government, not the right against involuntary self-prejudice. Increasingly in modern jurisprudence, the term has come to represent a realistic and reasonable evaluation of the respective interests of plaintiffs, defendants, and the state under the circumstances of the particular case.

Achieving an acceptable error rate is an important element of the due process calculus. A general law administered in its legal course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right, and affecting all persons alike, is due process of law. Due process has to do with the denial of fundamental fairness, which is shocking to the universal sense of justice; it deals neither with power nor with jurisdiction, but with their exercise.

One of the most famous and perhaps the most often quoted definition of due process of law is that of Daniel Webster in his argument in the Dartmouth College Case, in which he declared that by due process of law is meant "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

The term "due process of law" includes all the steps essential to deprive a person of life, liberty, or property; it includes all the forms and acts essential to its application and to give effect to it. The means that may be employed to accomplish the purpose of the law is the process; in other words, "process" is the mode by which the purpose of the law may be

effected. The hallmark of "property" under the Fourteenth Amendment's Due Process Clause is an individual entitlement grounded in state law which cannot be removed except for cause; once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating to the whole domain of social and economic fact.

898 Purpose and effect of provision

The Due Process Clause has as its purposes the ensuring of a fair and orderly administration of the laws, and the protecting of people against having the government impose burdens upon them except in accordance with the valid laws of the land.

There is a federal interest in protecting an individual citizen from state action that is wholly arbitrary or irrational. A claim that state legislation is arbitrary or irrational, or that the legislative process is defective can support denial of a due process claim. The clause forbids the state itself to deprive an individual of his or her life, liberty, or property without due process of law, but its language cannot be fairly extended to impose an affirmative obligation on the state to ensure that those interests do not come to harm through other means.

The Due Process Clause was intended to prevent the government from abusing its power or employing it as an instrument of oppression. Due process is not an end in itself; its constitutional purpose is to protect a substantive interest to which an individual has a legitimate claim of entitlement. Another purpose of the Due Process Clause is to protect the people from the state, but not to ensure that the state protects them from each other.

Caution: The mere receipt of a benefit from the government does not automatically create an entitlement to that benefit for purposes of a due process deprivation claim.

The purpose of the Bill of Rights in general, and the Due Process Clause of the Fourteenth Amendment in particular, is to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

The Due Process Clause does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society, and simple, state law contractual rights, without more, are likewise not worthy of substantive due process protection. This is so because substantive due process rights are created only by the Federal Constitution; state-law based rights, such as those provided by tort or contract law, constitutionally may be rescinded so long as the elements of procedural, not substantive, due process are observed. Property interests, on the other hand, protected by due process are not created by the Constitution; instead, they are created, and their dimensions defined, by existing rules or understandings that stem from an independent source such as state law.

Due process is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security.

899 Construction and application, generally

The provisions embodying the due process guarantee have received a very broad and liberal interpretation. The vague contours of due process do not leave judges at large to do as they will, and they may not draw on their merely personal and private notions and disregard the limits that bind them in their judicial functions. The Due Process Clause of the Fourteenth Amendment does not enact the economic theories of a particular era.

While the fact that a right is specifically dealt with in another part of the Federal Constitution may be indicative that it is not embraced within the Due Process Clause of the Fourteenth Amendment, such a rule is merely an aid to construction and must yield to more compelling considerations whenever such considerations exist, as where the right is of such a character that it cannot be denied without violating fundamental principles of liberty and justice. In resolving conflicting claims concerning the meaning of the Due Process Clause of the Fourteenth Amendment, the United States Supreme Court has looked increasingly to the Bill of Rights for guidance.

The protection extends to rights, in the broadest sense of the term. It conveys neither formal nor fixed nor narrow requirements; it is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. For instance, the Due Process Clause protects the traditional right to refuse an unwanted lifesaving medical treatment, but an asserted right to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause; the history of the law's treatment of assisted suicide has been and continues to be rejection of nearly all efforts to permit it. In determining whether the requirement has been observed, regard must be had to

substance rather than to form. The protection afforded by the Fourteenth Amendment against any state deprivation of liberty and property which does not meet the standards of due process is not to be avoided by the simple label a state chooses to fasten upon its conduct or its statute.

Decisions under the Due Process Clause require a close and perceptive inquiry into the fundamental principles of our society. The guarantee is inapplicable where there is no interference with life, liberty, or a vested property right. Decisions of the United States Supreme Court concerning the application of the Due Process Clause reveal the necessary process of balancing relevant and conflicting factors in the judicial application of that clause.

Many state constitutions also contain provisions guaranteeing due process for their citizens. Although a state court may, in construing its state's guarantee of due process, look for guidance and inspiration to constructions of federal Due Process Clause by federal courts, final conclusions on how a state due process guarantee found in a state constitution should be construed are for the state court to draw.

900 Synonymity of "due process" and "law of the land"

The term "due process of law" as used in the Federal Constitution has been repeatedly declared to be the exact equivalent of the phrase "law of the land," as used in the Magna Carta, and in some state constitutions. The law of the land means the law of the state in which the proceeding is brought; the prohibition of the Federal Constitution against denial of due process does not mean that a state must observe the due process of law of some other jurisdiction over which it has no control.

901 Procedural and substantive due process; generally

In its present stage of development, the concept of due process of law has a dual aspect, substantive and procedural, for the Due Process Clause of the Fourteenth Amendment not only accords procedural safeguards to protected interests, but likewise protects the substantive aspects of liberty against impermissible governmental restrictions. The Due Process Clause of the Fourteenth Amendment provides distinct guarantees of substantive due process and procedural due process; substantive due process includes both the protections of most of the Bill of Rights, as incorporated through the Fourteenth Amendment, and also the more general protection against certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. Procedural due process guarantees that a state proceeding which results in a deprivation of property is fair, while substantive due process insures that such state action is not arbitrary and capricious.

Observation: A temporary, nonfinal deprivation of property is nonetheless a "deprivation" subject to the due process requirements of the Fourteenth Amendment. Perkins v. City of West Covina, 113 F.3d 1004 (9th Cir. 1997). Although due process includes both procedural and substantive components, substantive due process is far narrower in scope than procedural due process. As relating to the Due Process Clause provision that one cannot be deprived of the substantive rights of life, liberty, and property except pursuant to constitutionally adequate procedures, the categories of substance and procedure are distinct. Once it is determined that the Due Process Clause applies, the question remains what process is due. When a state alters a state-conferred property right through its legislative process, the legislative determination provides all the process that is due.

Observation: The process due depends in large part on circumstances, as cases distinguish sharply between deprivations caused by the random, unauthorized conduct of state officials, and deprivations caused by conduct pursuant to an established state procedure; for the former, the state is not automatically liable, but in the latter case there may be liability where state policy approves or directs the conduct, but falls below constitutional standards.

The Due Process Clause is not implicated by a state official's negligent act causing unintended loss of, or injury to, life, liberty, or property, since a mere lack of due care by a state official does not "deprive" an individual of life, liberty, or property under the Fourteenth Amendment.

Observation: An unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available.

The guarantees of procedural and substantive due process, considered together, have been well summed up as follows: a minimum requirement of due process, allowing for variations in method, is always that a procedure be afforded under which he or she whose property is to be taken shall be allowed to be heard; that the determination under which he or she is required to surrender the property be reasonable; and that the determination be free from the opportunity for arbitrary

power. The Supreme Court has also noted that a wise public policy may require that higher standards be adopted than those minimally tolerable under the Constitution.

902 What procedural process is due; generally

While due process of law, in its procedural aspect, has never been a term of fixed and invariable content, and thus has been said to have a "far-flung and undefined range," the courts on a number of occasions have attempted to draft a broad working definition incorporating the basic requisites of the constitutional guarantee. Thus, procedural due process has been defined as the aspect of due process which relates to the requisite characteristics of proceedings looking toward a deprivation of life, liberty, or property. Procedural due process makes it necessary that where one may be deprived of such a right, the person must be given notice of this fact (that is, he or she must be given notice of the proceedings against him or her), the person must be given an opportunity to defend himself or herself (that is, a hearing) before an impartial tribunal having jurisdiction of the cause, and the problem of the propriety of the deprivation, under the circumstances presented, must be resolved in a manner consistent with essential fairness. Determination of the appropriate form of procedural protection required under the Due Process Clause requires evaluation of all the circumstances and accommodation of competing interests, in which an individual's right to fairness must be respected, as must a court's need to act quickly and decisively.

The Due Process Clause calls for two separate inquiries in evaluating an alleged procedural due process violation: did the plaintiff lose something that fits into one of the three protected categories of life, liberty, or property; and, if so, did the plaintiff receive the minimum measure of procedural protection warranted under the circumstances? A violation of procedural due process may occur even where the damages are only nominal. In fact, for purposes of procedural due process, a damage remedy is not an essential component of constitutionally adequate review procedures. The Due Process Clause requires that the government follow appropriate procedures when it seeks to deprive any person of life, liberty or property, and it also prevents certain government actions, regardless of the fairness of the procedures used to implement them.

The idea of procedural due process is reflected in the statement that it is a rule as old as the law that no one shall be personally bound until he or she has had a day in court, by which is meant until he or she has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity lacks all the attributes of a judicial determination; it is judicial usurpation and oppression and can never be upheld where justice is fairly administered.

Though the primary function of legal process is to minimize the risk of erroneous decisions, the Due Process Clause does not mandate that all governmental decisionmaking comply with standards that assure perfect, error-free determinations.

Specific requirements of procedural due process in regard to criminal proceedings and administrative proceedings and review thereof are treated in other articles.

903 Effect of past practices

Ultimately, federal law prescribes the nature and extent of the procedural protections afforded by the Federal Constitution. It is certainly true, however, that if the state courts have acted in consonance with the constitutional laws of the state and its own procedure, it is only in very exceptional cases that a federal court will interfere on the ground that there has been a failure of due process.

Procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions. Due process is primarily that kind of procedure which is suitable and proper to the nature of the case, and sanctioned by established customs and usages, although it is not necessary that procedure conform to past usage. New methods may be adopted or provided, so long as they are in harmony with the underlying principles of the constitutional guarantee. In comparison with other constitutional claims such as equal protection or free exercise, a cognizable procedural due process claim does not typically arise until proceedings are at a mature stage and due process has not been furnished, even though some tangible deprivation has occurred. Any legal proceeding sanctioned by age and custom, or newly devised in the discretion of the legislative power for the furtherance of the general public good, which regards and preserves the fundamental rights of property and justice, constitutes due process of law.

904 Factors considered; tests applied

The requirements of due process frequently vary with the type of proceeding involved. Procedural due process in the administrative setting does not always require application of the judicial model. Due process is flexible and calls for

such procedural protections as the particular situation demands; the quantum and quality of the process due in a particular situation depends on the need to serve the due process function of minimizing the risk of error in decisionmaking.

In asserting a procedural due process violation, a plaintiff must first demonstrate that he or she had a protected property or liberty interest. A procedural due process claim requires a two-part test. First, a court determines whether the defendants deprived the plaintiff of a protected liberty or property interest, and second, the court determines what constitutional process was due.

Practice guide: To determine what process is constitutionally due, the Supreme Court generally has balanced three distinct factors: the private interest that will be affected by official action, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and the government's interest.

Consideration of what procedures due process may require under any given set of circumstances thus must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

905 Fundamental requirements of procedural due process

The fundamental requirement of due process is an opportunity to be heard upon such notice and in such proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. Exceptions to the principle that a person must be afforded notice and an opportunity for a hearing before he or she is deprived of his or her rights can be justified only in extraordinary circumstances. Thus, for purposes of due process, except in extraordinary situations in which some valid governmental interest is at stake that justifies postponing a hearing until after the event, the government must provide a hearing before depriving an individual of a protected interest.

Application of the prohibition against any state deprivation of life, liberty, or property without due process of law requires a two-stage analysis: the court must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of "life, liberty, or property"; if protected interests are implicated, the court must then decide what procedures constitute "due process of law." Interests comprehended within the meaning of either "liberty" or "property" under the procedural guarantees of the Due Process Clause of the Fourteenth Amendment include interests that are recognized and protected by state law, and interests guaranteed in one of the provisions of the Bill of Rights which have been "incorporated" into the Fourteenth Amendment; 42 USCA ß 1983 -- which creates a right of action against a person who, under color of state law, subjects another to the deprivation of any right secured by the Federal Constitution -- makes a deprivation of such latter type of right actionable independently of state law. And, whether the Constitution requires that a particular right obtain in a specific proceeding depends on a complexity of factors, such as the nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding. Due process is required only when a decision of the state implicates an interest within the protection of the Fourteenth Amendment, and to determine whether due process requirements apply in the first place, the United States Supreme Court must look not to the "weight" but to the nature of the interest at stake; a person clearly must have more than an abstract need for a protectable right and more than a unilateral expectation of it -- instead, he or she must have a legitimate claim of entitlement to it.

Before the United States Supreme Court invokes the Constitution to impose a due process procedural requirement, it should be reasonably certain that the effect will be to afford protection appropriate to the constitutional interests at stake. Both the degree of potential deprivation of a benefit or interest that may be created by a particular decision and the possible length of wrongful deprivation are factors to be considered in assessing the validity of any governmental decisionmaking process for purposes of due process. Moreover, in order to fully assess the reliability and fairness of a system of a governmental procedure governing the termination of benefits for purposes of its compliance with due process, consideration must be given not only to the reversal rate for appealed cases, but also to the overall rate of error for all denials of benefits. However, although the United States Supreme Court eschews rigid or formalistic limitations on the protection of procedural due process, it nevertheless observes certain boundaries, for the words "liberty" and "property" in the Due Process Clause of the Fourteenth Amendment must be given some meaning. The Due Process Clause of the Fourteenth Amendment requires that state action not transgress those fundamental notions upon which all our civil and political institutions are based. The rationale for granting procedural protection to an interest that does not rise to the level of a fundamental right is the prevention of arbitrary use of government power. Procedural due process claims do not implicate the egregiousness of the action itself, but only question whether the process accorded prior to the dep-

rivation was constitutionally sufficient; although the existence of a protected right must be the threshold determination, the focus of the inquiry centers on the process provided, rather than on the nature of the right.
906 What is not required; generally
"Procedural due process," unlike its substantive counterpart, does not require that the government refrain from making a substantive choice to infringe upon a person's life, liberty, or property interest; it simply requires that the government provide due process before making such a decision.

The applicability of procedural due process rights is not governed by any wooden distinction between "rights" and "privileges," nor does it rest on any distinctions as to the "importance" or "necessity" of the property involved. Furthermore, although the establishment of prompt, efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication, nevertheless the Constitution recognizes higher values than speed and efficiency, or convenience. Similarly, financial cost alone is not a controlling weight in determining whether procedural due process requires a particular procedural safeguard prior to some governmental decision, but the government's interest, and hence that of the public, in conserving scarce fiscal and governmental resources, is a factor that must be weighed; at some point the benefit of an additional safeguard to the individual affected and to society,in terms of increased assurance that the action is just, may be outweighed by the cost. Furthermore, the range of interests protected by procedural due process is not infinite. Thus, although determination of whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer grievous loss, not every grievous loss visited upon a person by the state is sufficient to invoke the procedural protections of the Due Process Clause of the Fourteenth Amendment.
907 Notice and hearing not required when new legislation is passed
Due process requires a notice and hearing only in quasi-judicial or adjudicatory settings and not in the adoption of general legislation; from the inception of this nation's legal system, statutes of general application have regularly been enacted without affording each potentially affected individual notice and hearing.
908 Particular form of procedure not required; state power as to form
The guarantee of due process, viewed in its procedural aspect, requires no particular form of procedure. Due process does not require a state to adopt one procedure over another on the basis that the procedure may produce results more favorable to the party challenging the existing procedures. Instead, due process requires only that certain safeguards exist in whatever procedural form it is afforded. The Due Process Clause in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided that the method of procedure adopted for these purposes gives reasonable notice and affords a fair opportunity to be heard before the issues are decided. For example, the states are afforded great flexibility in satisfying the federal constitutional requirements of due process in the field of taxation, and as long as state law provides a clear and certain remedy, the states may determine whether to provide predeprivation process, such as an injunction, or instead to afford postdeprivation relief, such as a refund. And violation of a state's formal procedure does not in and of itself implicate constitutional due process concerns.

Existence of a detailed set of procedural rules is inadequate to create a constitutionally protected property right for due process purposes; even though state law might command faithful adherence to the institution's mandatory rules and a violation may result in some remedy or sanction, violating a procedural rule alone does not accomplish the creation of a protectable constitutional interest. When a state provides a party with a notice and a hearing that comport with due process standards, the state's failure to follow its own rules is not per se a deprivation of substantive due process.

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in the state courts or regulate the practice therein. The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control.

Nothing in the Federal Constitution prevents a state from providing such a system of courts as it chooses. A state does not violate the Due Process Clause of the Fourteenth Amendment by providing alternative or additional procedures beyond what the Constitution requires.

From the foregoing, it follows that due process does not necessarily require judicial process, or trial by jury, and even where a right to a jury trial is granted, there is nothing in the Federal Constitution or its amendments that requires a state to maintain the familiar line between the functions of the jury and those of the court.

Although due process has its roots in the traditions of the common law, it is not to be inferred that all modes of procedure which do not have the sanction of this early law are to be condemned. Furthermore, the Fifth Amendment itself guarantees no particular form of procedure; it protects only substantial rights.

909 Highest degree of fairness and wisdom not required

What state procedures are fair, what state process is constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented, and history is relevant to these inquiries. The very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case, but instead procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions. No particular procedure violates the Fourteenth Amendment merely because another method may seem fairer or wiser. A state may regulate the procedure of its courts in accordance with its own conception of policy and fairness unless it offends some principle of liberty or justice ranked as fundamental, such as the requirements of notice and hearing, or unless it is unreasonable or arbitrary. Thus, the protections of the Due Process Clause are only invoked when state procedures which may produce erroneous or unreliable results imperil a protected liberty or property interest.

910 Effect of state law on due process determination

The Due Process Clause in the Fourteenth Amendment does not make the statutes of the several states the test of what it requires. A state-created right can, in some circumstances, beget yet other rights to procedures essential to a realization of the parent right; however, the underlying right must have come into existence before it can trigger due process protection. While procedures in civil litigation long sanctioned by the passage of time and widely used throughout the United States will generally satisfy the Supreme Court as being due proceedings at law, or due process of law, the fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, although it is plainly worth considering in determining whether the practice offends some principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. 150/1

911 Substantive due process, generally; definitions

The principle of due process of law had its origin in England, where it was a protection to individuals from arbitrary action on the part of the Crown. In this country the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his or her rights, whether relating to his or her life, liberty, or property. Due process of law has come since the end of the nineteenth century to be applied to the field of substantive rights in the form of the proposition that the legislature, as well as the judiciary, is forbidden to act arbitrarily in contravention of the fundamental principles of liberty and justice that lie at the base of all civil and political institutions of the United States.

The doctrine of substantive due process has the two primary features of specially protecting those fundamental rights and liberties which are, objectively, deeply rooted in the nation's history and tradition, and providing a careful description of some asserted fundamental liberty interest. The doctrine of substantive due process is concerned with whether a particular state regulation of an individual interest is justified. Whenever the individual interest involves life, liberty, or property, the test under substantive due process is whether there is a reasonable connection between the statute and the promotion of the safety and welfare of the community.

Substantive due process under the Fifth Amendment is an expanded concept which is a limitation upon all the powers of Congress, even the war power. And under the Fourteenth Amendment, the right to substantive due process includes the right to be free from state and local government interference with certain constitutionally recognized fundamental rights.

No abstract right to substantive due process exists under the United States Constitution. Such rights are created only by the Federal Constitution, not by state laws.

The substantive due process doctrine does not authorize courts to expand constitutional clauses at will. In fact, as a general matter, the Supreme Court is reluctant to expand the concept of substantive due process, because guideposts for responsible decision making in this uncharted area are scarce and open-ended.

912 Rational basis test

In substantive due process law, due process may be characterized as a standard of reasonableness, which is similar to the standard or test of "rational grounds" used in determining a claim of unequal protection of the laws. In fact, the rational basis test is identical under the two rubrics of equal protection and due process.

The test of whether legislation violates due process is whether, in enacting legislation, the legislature was acting in pursuit of permissible state objectives and, if so, whether the means adopted were reasonably related to accomplishment of those objectives. Stringent regulations that strictly limit state officials' discretion may, as an example, give rise to a constitutionally protected interest.

Practice guide: Where fundamental rights or interests are not implicated or infringed, state statutes are reviewed under the rational basis test, under which a statute withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature could rationally have concluded was served by the statute. When subjecting a state statute to a rational basis review on a substantive due process claim, a court is not entitled to second-guess the legislature on the factual assumptions or policy considerations underlying the statute.

Caution: Where plaintiffs rely on substantive due process to challenge a governmental action that does not impinge on fundamental rights, a court does not require that the government's action actually advance its stated purpose; instead, it is sufficient that the government could have had a legitimate reason for acting as it did. Halverson v. Skagit County, 42 F.3d 1257 (9th Cir. 1994), as amended on denial of reh'g, (Feb. 9, 1995). The only substantive due process inquiry permitted is whether the legislature rationally might have believed that the predicted reaction would occur or that the desired end would be served. It is up to the person challenging the statute to convince the court that the legislative facts on which the classification of the statute is apparently based could not reasonably be conceived as true by the governmental decisionmaker. A statute withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature rationally could have concluded was served by the statute. The true purpose of a governmental policy is irrelevant for a rational basis analysis under the Due Process Clause; the question is only whether a rational relationship exists between the policy and a conceivable legitimate governmental objective. If it is at least debatable whether a rational relationship exists between a governmental policy and a conceivable legitimate governmental objective, there is no substantive due process violation. The fact that a legislative act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, and thus subject to a facial substantive due process challenge.

913 Compelling state interest test

Where an individual interest involves a fundamental right, the test of substantive due process is whether a "compelling state interest" is advanced by the regulation and whether the regulation is the "least restrictive method" available to effectuate the compelling state interest; this test of "least restrictive method" in advancing a "compelling state interest" is similar to the test of the "two-tiered" standard used in considering equal protection issues.

914 Substantive rights protected by due process; generally

The substantive component of the Due Process Clause protects only those rights that are fundamental; in addition, protection of substantive due process is narrow and covers only state action which is so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any predeprivation procedural protections or of adequate rectification by any postdeprivation state remedies. For instance, a state constitutional provision permitting individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited does not deny a shopping center owner due process, in that such a law is not unreasonable, arbitrary, or capricious. Losses from random and unauthorized official acts are not violations of the Due Process Clause so long as there is an adequate postdeprivation remedy. And a city's alleged failure to follow state law in denying a permit to renovate two apartment buildings is not a substantive due process violation. Nevertheless, substantive due process protection has been extended to certain rights, such as the right to privacy, that are not enumerated in the Bill of Rights.

915 Types of substantive due process claims; in general

A substantive due process claim involves the balancing of a person's liberty interest against the relevant government interests. Substantive due process claims are of two types: the first type includes claims asserting denial of a right, privilege, or immunity secured by the Constitution or by a federal statute; and the second type is directed at official acts which may not occur, regardless of the procedural safeguards accompanying them. Application of the broad restraints of due process compels an inquiry into the nature of the demand being made upon individual freedom in a particular context and the justification of the social need on which the demand rests.

Substantive due process claims may be brought under two theories: (1) deprivation of an identified liberty or property interest protected by the Fourteenth Amendment; or (2) conduct by a state that "shocks the conscience."

916 Protection from arbitrary or capricious actions

Protection from arbitrary action is the essence of substantive due process. Due process demands that a law be not unreasonable or arbitrary, and that it be reasonably related and applied to an actual and manifest evil. A statute or a municipal

ordinance is arbitrary and capricious, and hence is constitutionally invalid as transgressing due process requirements, if it fails to advance a legitimate governmental interest or if it is an unreasonable means of advancing a legitimate governmental interest; however, if any conceivable legitimate governmental interest supports the ordinance, that measure is not arbitrary and capricious and hence cannot offend substantive due process norms. The courts, as custodians of the judicial powers of government, are not obliged to enforce a statute which, through a rule of evidence, arbitrarily deprives a litigant of his or her rights, or which permits a defendant to suffer conviction without due process of law.

To satisfy the requirements of the Due Process Clause, laws and regulations must provide specific standards which avoid arbitrary and discriminatory enforcement. The modern framework for a substantive due process analysis concerning economic legislation only requires an inquiry into whether legislation is reasonably related to a legitimate governmental purpose; the "vested rights" analysis appears in many situations to have been supplanted.

Due process may be violated if the government acts arbitrarily or capriciously.

Practice guide: The means by which an ordinance comes to pass is irrelevant to the question of whether the substance of an ordinance is constitutionally infirm on its face under substantive due process analysis.

A statute runs afoul of the Due Process Clause only if it manifests a patently arbitrary classification, utterly lacking in any rational justification. Thus, public officials violate substantive due process rights if they act arbitrarily or capriciously.

Practice guide: To establish a violation of substantive due process arising from some challenged governmental conduct, a plaintiff is ordinarily required to prove that such conduct was clearly arbitrary and unreasonable, having no substantial relationship to the public's health, safety, morals, or general welfare.

All state statutes, ordinances, and regulations may be challenged on the basis that they are wholly arbitrary or irrational in purpose or means. However, the states, for instance, have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case, and only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. Although a reasonableness standard rather than a precise formula is imposed on the award of substantive damages, the Due Process Clause of the Constitution does impose a substantive limit on punitive damage awards, and such decision should not be committed to the unreviewable discretion of a jury.

917 Bias and bad faith

To support a claim of a substantive due process violation, a plaintiff must show some irrational government action or government action that is motivated by bias, some improper purpose, or bad faith. A requirement that justice must satisfy the appearance of justice, even to the point of requiring a trial by judges who have no actual bias and would do their best to weigh the scales of justice equally between contending parties, applies where a private party is given statutory authority to adjudicate a dispute. To implicate due process, claims of general institutional bias must be harnessed to a further showing, such as potential conflict of interest or pecuniary stake in outcome of litigation.

918 Oppressive or shocking behavior

State conduct offends substantive due process when it shocks the conscience or constitutes a force that is so brutal as to offend even hardened sensibilities. In fact, only a substantial infringement of state law prompted by personal or group animus or a deliberate flouting of the law that trammels significant personal or property rights is a substantive due process violation. Substantive due process prevents governmental power from being used for purposes of oppression, or an action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests. It can serve as a check on legislative enactments thought to infringe on fundamental rights otherwise not explicitly protected by the Bill of Rights, as a check on official misconduct which infringes on a fundamental right, or as a limitation on official misconduct which, although not infringing on a fundamental right, is so literally conscience-shocking, and hence oppressive, as to rise to the level of a substantive due process violation. A mere violation of state law is not the kind of "truly irrational" governmental action which gives rise to a substantive due process claim.

Due process is not merely a procedural safeguard; it reaches those situations where the deprivation of life, liberty, or property is accomplished by legislation which, by operating in the future, can, given even the fairest procedure in application to individuals, destroy the enjoyment of all three. Where a government action does not deprive a plaintiff of a particular constitutional guarantee or shock the conscience, that action survives the scythe of substantive due process so long as it is rationally related to a legitimate state interest.

Observation: The fact that a statute may, in certain instances, be inequitable, harsh, or oppressive does not violate the Due Process Clause of the Constitution, provided it operates without any discrimination and in like manner against all persons of a class.

919 Necessity that laws operate equally

Although the Fifth Amendment contains no equal protection clause and restrains only such discriminatory legislation by Congress as amounts to a denial of due process, due process of law and the equivalent phrase "law of the land" have frequently been defined to mean a general and public law operating equally on all persons in like circumstances, and not a partial or private law affecting the rights of a particular individual or class of individuals in a way in which the same rights of other persons are not affected. To avoid overbreadth, the Due Process Clause does not require Congress to make statutory classifications that fit every individual with precisely the same degree of relevance, although even a clear, precise ordinance may be overbroad if it prohibits constitutionally protected conduct. Subject to that caveat, under this guarantee not only must a statute embrace all persons in a like situation, but the classification must be natural and reasonable, not arbitrary and capricious. Due process of law is denied when any particular person of a class or of the community is singled out for the imposition of restraints or burdens not imposed upon, and to be borne by, all of the class or of the community at large, unless the imposition or restraint is based upon existing distinctions that differentiate the particular individuals of the class to be affected from the body of the community.

In order to make out a disparate impact warranting further scrutiny of a federal statutory classification under the equal protection analysis of the Due Process Clause of the Fifth Amendment, it is necessary to show that the class which is purportedly discriminated against suffers a significant deprivation of a benefit or imposition of a substantial burden. An act which affects only, and exhausts itself upon, a particular person or his or her rights and privileges, and has no relation to the community in general, is rather a sentence than a law and one which condemns without a hearing. But due process is not violated by legislation which does not find equivalence where there is none, or which does not lay on a burden unrelated to privilege or benefit. As a general rule, whatever, in the matter of classification, complies with the requirements as to the equal protection of the laws will, so far as such an objection is concerned, be likewise upheld as amounting to due process of law. In fact, the courts frequently refer to both clauses at once in discussing the constitutionality of statutes.

Observation: The so-called "Hyde Amendment," whereby the United States Congress, in appropriations legislation, has limited the types of medically necessary abortions for which federal reimbursement under the Medicaid program is available, does not impinge on any "liberty" protected by the Due Process Clause of the Fifth Amendment by differentiating between those who can pay for an abortion and those who cannot.

920 Definiteness or vagueness of laws, regulations, and orders

The void-for-vagueness doctrine is embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments, and it is a general principle of statutory law that a statute must be definite to be valid. A statute is void for vagueness when its prohibition is so vague as to leave an individual without knowledge of the nature of the activity that is prohibited. To pass constitutional muster, statutes challenged as vague must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement.

Observation: Congress can enact legislation under the enforcement power of the Fourteenth Amendment enforcing the constitutional right to free exercise of religion. City of Boerne v. Flores, 117 S. Ct. 2157, 138 L. Ed. 2d 624, 74 Fair Empl. Prac. Cas. (BNA) 62, 70 Empl. Prac. Dec. (CCH) P 44785 (U.S. Sup. Ct. 1997), on remand to, 119 F.3d 341 (5th Cir. 1997). It has been recognized that a statute is so vague as to violate the Due Process Clause of the United States Constitution where its language does not convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices, or stated otherwise, where its language is such that people of common intelligence must necessarily guess at its meaning. However, it has been held that a statute is not unconstitutionally vague where it is set out in terms as to which an ordinary person exercising ordinary common sense can sufficiently understand and comply. The standard of definiteness which statutory language must meet if the statute is to comport with the requirements of due process is not one which it is impossible to satisfy. If the meaning of terms employed in the statute has long been recognized in law and life, they will be considered sufficiently definite. A statute does not offend against the Due Process Clause because it contains no preamble or other statement of purposes and objectives.

Observation: A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process; however, to succeed, the complainant must demonstrate that the law is impermissibly vague in all of its applications.

Obviously, a statute is not unconstitutionally vague merely because it is stringent and harsh. And a statute is not unconstitutionally vague merely because clearer and more precise language might have been used, since the Constitution does not require impossible standards of statutory clarity. Nor is a statute or regulation so vague as to deny due process merely because it occasionally requires the trier of fact to determine the question of reasonableness. Similarly, there is authority for the view that a statute will be upheld by the Supreme Court against an attack on the ground of vagueness where an appropriate construction of the statute by a state court has removed such alleged vagueness. In determining the constitutionality of a statutory provision alleged to be void for vagueness, the state courts are bound by the standard of vagueness laid down by the United States Supreme Court.

The vice of unconstitutional vagueness is aggravated where the statute in question operates to inhibit the exercise of individual freedoms affirmatively guaranteed by the Federal Constitution.

The rules as to definiteness and vagueness apply also to an order of a court, or an executive order.

921 Effect of party being unsuccessful before tribunal; errors of tribunal

The mere fact that a person is unsuccessful in a court in a matter involving life, liberty, or property does not show that there has been a violation of the due process of law guarantee, since due process secures only an opportunity to be heard, not guaranteed or probable success. Nor is due process denied the unsuccessful party merely because a judgment awards relief other than and different from that which was sought in the pleadings. The Fourteenth Amendment does not raise a federal question in every case to test the justice of a decision.

The Fourteenth Amendment does not, in guaranteeing due process, assure immunity from judicial error. And not every trial error or infirmity which might call for application of an appellate court's supervisory powers correspondingly constitutes a failure to observe that fundamental fairness essential to the very concept of justice. Even an erroneous decision of a court on matters within its jurisdiction does not deprive the unsuccessful party of his or her rights under this guarantee where the parties have been fully heard in the regular course of judicial proceedings. The same rule applies to the errors of other tribunals or officers. It seems clear that a violation of the Due Process Clause may be committed by the state judiciary, at least in construing a state statute. But the United States Supreme Court cannot interfere unless the judgment amounts to a merely arbitrary or capricious exercise of power or is in clear conflict with those fundamental principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.

922 Retrospective or prospective application of statute or judicial decision

The retrospective aspects of economic legislation, as well as its prospective aspects, must meet the test of due process: a legitimate legislative purpose furthered by a rational means. For example, the Supreme Court has held that the application of an income tax statute to the entire calendar year in which the enactment took place does not per se violate the Due Process Clause of the Fifth Amendment.

Practice guide: When the United States Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether the events predate or postdate the Supreme Court's announcement of the rule.

The Fourteenth Amendment does not make an act of legislation void merely because it has some retrospective application, but rather forbids the taking of life, liberty, or property without due process of law, and assuming that statutes of limitations, like other types of legislation, can be so manipulated that their retroactive effects would offend the Constitution, the lifting of the bar of a statute of limitations to restore a remedy lost through mere lapse of time is not per se an offense against the Fourteenth Amendment; Congress has constitutional power to revive, by enactment, an action which, when filed, is already barred by the running of a limitations period, and can constitutionally provide for the retroactive application of an extended limitations period for the filing of a complaint with a government agency. The Due Process Clause of the Federal Constitution protects the interest in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Due Process Clause may not suffice to warrant the statute's retroactive application.

The highest court of a state, in overruling an earlier decision, may make a choice for itself whether the new rule declared by it shall operate prospectively only or apply also to past transactions, and the alternative is the same whether the subject of the new decision is common law or the construction of a statute. A court may give its overruling of an earlier decision a retroactive bearing, thereby making invalid that which was valid in the doing.

In appropriate cases, a court may, in the interest of justice, make its ruling prospective only, and this applies in the constitutional area where the exigencies of the situation require such an application. The Federal Constitution neither prohibits nor requires retrospective effect. Although an entirely prospective change in the law may disturb the relied-upon expectations of individuals, such a change would not be deemed therefore to be violative of due process, under the Federal Constitution.

923 State and federal government, generally

The guarantee of due process of law which is stated in the Fifth Amendment binds the Federal Government, while that stated in the Fourteenth Amendment binds the states; and the restraint imposed upon legislation by the Due Process Clauses of the Fifth and Fourteenth Amendments is the same. Thus, the limitations inherent in the requirements as to due process of law are binding equally on the United States and on the several states. While it is for the state courts to determine the adjective as well as the substantive law of a state, they must, in so doing, accord parties due process of law. State law may provide relief beyond the demands of federal due process, but under no circumstances may it confine petitioners to a lesser remedy.

The Fifth Amendment Due Process Clause applies also to acts of Congress with respect to the inhabitants of a territory or possession of the United States. The purpose of this clause is to exclude arbitrary power from every branch of the government. The guarantee is violated whenever any person, by virtue of his or her public position under the Federal Government, deprives another of any right protected by that amendment. For example, for purposes of the Due Process Clause of the Fifth Amendment, the restraints of the Fifth Amendment reach far enough to embrace the official actions of a United States Congressman in hiring and dismissing his or her employees. The guarantee may also be violated by unfairness or corruption of officers in the performance of administrative functions.

924 State and municipal agencies, departments, or officials

A state may not by any of its agencies, departments, or officials, whether legislative, judicial, or executive, disregard the constitutional prohibition. However, when the action complained of is legislative in nature, due process is satisfied when the legislative body performs its responsibilities in a normal manner prescribed by law. Every state official, high and low, is bound by the Fourteenth Amendment, including officials of the executive and judicial departments of the state. The inhibition includes all functionaries of state government, judicial as well as political. For example, a state university is a state actor and must comply with the terms of the Due Process Clause when the university decides to impose a serious disciplinary sanction upon one of the university's tenured employees. And acts and practices of a commission created by a state legislature for the purpose of combating juvenile delinquency, which directly and designedly stop the circulation of publications found objectionable by the commissioner, are performed under color of state law and so constitute acts of the state within the meaning of the Fourteenth Amendment.

Municipalities cannot challenge state actions on federal constitutionality grounds because they are not "persons" within the meaning of the Due Process Clause. Municipal ordinances adopted by state authority, however, constitute "state action" within the prohibition of the Fourteenth Amendment, as do actions of municipal and county officials.

925 Congress and federal agencies

The great substantive powers of Congress are all subject in their operation to the guarantees of due process contained in the Fifth Amendment. The amendment has been applied to restrict the powers of Congress within the limitations of due process in the exercise of the war power, the taxing power, the bankruptcy power, and the power to regulate commerce.

An agency created by federal law and deriving authority from the legislative powers conferred upon Congress by the Federal Constitution is within the reach of the Due Process Clause of the Fifth Amendment. But the due process guarantee does not circumscribe the activities of a federal agency that is lacking in power to affect those rights which due process protects.

926 Private persons; generally

It is the established general rule that the provisions of the Due Process Clauses in a state constitution and in the Federal Constitution are inhibitions upon the powers of governments and their agencies, not upon freedom of action of private persons, including corporations. Thus, the Fourteenth Amendment itself erects no shield against merely private conduct, however discriminatory or wrongful. However, a violation of the due process guarantee may result from the interplay of governmental and private action where it appears that it is only after the initial exertion of state power that private action takes hold. Although the Due Process Clause of the Fourteenth Amendment protects a property interest only from deprivation by state action, the private use of state-sanctioned private remedies or procedures does not rise to the level of state action; but when private parties make use of state procedures with the overt, significant assistance of state offi-

cials, state action may be found. A state's limited involvement in the mere running of the period of a self-executing statute of limitations -- where the state's interest in such a statute is in providing repose for potential defendants and in avoiding stale claims, and where the state has no role to play beyond enactment of the limitations period -- does not constitute the type of state action required to implicate the protections of the Due Process Clause. In other words, where the government has become so entangled in the actions of a private party, it may warrant the requirement that such private conduct conform to the constitutional standards of behavior.

A state has legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations in the interest of regulating the courts' workload and determining when a claim is stale.

Observation: Property owners have a right under the Federal Constitution not to have the government physically occupy their property without due process of law or without just compensation; however, while sit-ins may have deprived owners of racially segregated lunch counters of some constitutional rights -- if one uses that term to include rights constitutionally protected against only official, as opposed to private, encroachment -- the elimination, under the Civil Rights Act of 1964 of the restaurant owners' right to exclude blacks from their establishments does not violate the Due Process Clause or Takings Clause of the Fifth Amendment.

The mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for purposes of the Due Process Clause of the Fourteenth Amendment; nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so; although acts of a heavily regulated business entity may more readily be found to be "state" acts than will be acts of an entity lacking such characteristics, nevertheless the inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.

All state regulated businesses affected with a public interest are not "state actors" in all their actions for purposes of the Due Process Clause of the Fourteenth Amendment. And the Supreme Court has indicated that the Fourteenth Amendment does not apply to a private entity merely because that entity has a monopoly under state law.

Observation: The threshold question in any judicial inquiry into conduct claimed to be violative of the Fourteenth Amendment is whether the state has in some fashion involved itself in what, in another setting, would otherwise be deemed private activity. Purely private conduct does not rise to the level of constitutional significance, absent a significant nexus between the state and the actors or the conduct; this nexus, which has been denominated "state action" is an essential requisite to any action grounded on a deprivation of due process of law. Furthermore, where the impetus for the allegedly unconstitutional conduct is private, the state must have significantly involved itself for that action to fall within the ambit of the Fourteenth Amendment.

927 Specific private persons or organizations

As examples of the principles discussed in the preceding section, private organizations which have been held not subject to the Due Process Clause because they were not "state actors" have included:

.a testing service whose standardized test is a prerequisite to admission to nearly all law schools;

.a private charitable organization which provided financial assistance and a variety of other services to refugees seeking to emigrate to the United States;

.a volunteer first-aid squad which treated a person injured during an arrest by a police officer;

.the National Collegiate Athletic Association (NCAA);

.a private moneylender;

.a wife in a domestic violence case;

.a railroad which conducted a grievance proceeding following dismissal of a railroad employee;

.a state-chartered mutual savings and loan association;

.an Indian tribe exercising police powers; and

.private security officers hired by concert promoters to conduct pre-concert pat-down searches at a public university auditorium.

928 Generally

The guarantee of due process of law inures to the benefit of persons who are citizens of the United States or of the state in which the question arises. It is not, however, limited to such citizens. The guarantee is universal in its application to all persons within the territorial jurisdiction of a state or the United States, without regard to any differences of race, color, or nationality, when they have come within the territory of the United States and developed substantial connections with this country. By their terms, federal and state constitutional guarantees of due process extend to "persons."

The Due Process Clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security for those persons it protects. It forbids the state to deprive an individual's life, liberty, or property without due process of law, but its language cannot be fairly extended to impose an affirmative obligation on the state to ensure that those interests do not come to harm through other means.

929 Particular persons

In terms of the application of the Due Process Clauses to specific individuals or entities, due process protection extends to --

-- infants and children.

-- lawyers.

-- mental incompetents.

-- military personnel.

-- parolees.

-- poor persons.

-- pretrial detainees.

-- prisoners.

-- private associations or societies and their members.

-- private corporations.

-- public employees.

-- school boards.

On the other hand, as used in the Fourteenth Amendment to the United States Constitution, the word "person" does not include the unborn.

930 States; political subdivisions

Although there are decisions referring to the rights of a state under the Due Process Clause, the Supreme Court and other federal courts have expressly acknowledged that a state is not a person for the purposes of the Due Process of Law Clause of the Fifth Amendment.

Numerous cases have held that municipal entities are not "persons" within the meaning of the Fourteenth Amendment and that they may not invoke the protection of the Fourteenth Amendment against the state. It seems clear that so far as the state and its instrumentalities are concerned, there is no scope for invoking the due process guarantee as against the action of the state itself. And the due process requirement is not applicable to frustrate state agencies in their relationship with each other. The power of the state to control its own governmental agencies in their governmental capacities is not ordinarily restrained by the requirement of due process. In the application of this rule to municipalities, the question depends upon the view taken in the particular jurisdiction as to the rights of a municipal government. In a majority of states the right of the people of a municipality to control its affairs is not considered as an inherent right residing in the people, but as dependent for its existence on the legislative will. In such jurisdictions the state has a power over the rights and properties of municipalities which is unrestricted by the due process guarantee. The same rule applies to townships and to counties.

In jurisdictions in which the right to local self-government is treated as a right inherent in cities and towns, and one which, if not surrendered on the adoption of the state constitution, cannot be taken away by the legislature, the due process guarantee may apply to municipal corporations, at least as to their proprietary functions.

The right of home rule by cities has been established in a number of states by constitutional provision. A home-rule city is protected by the due process guarantee.

931 Necessity of notice

As a matter of due process, parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified. Consequently, notice is an essential element of due process, inasmuch as the right to be heard, ensured by the guarantee of due process, has little reality or worth unless one is informed that a matter is pending and can choose for himself or herself whether to appear or default, acquiesce, or contest.

Caution: The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights.

Absent some exigent or other extraordinary circumstances, a court may not award equitable relief without first providing all affected parties actual notice that is contemplating a remedial action and affording them a meaningful chance to be heard. The fact that a court enjoys broad discretion in shaping solutions does not relieve it from its obligation to afford procedural due process to all parties in interest. This is especially true in proceedings of a judicial nature affecting the property rights of citizens. Notice and an opportunity to be heard are also essential on the basis of procedural due process, where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him or her. However, reputation alone is not an interest protected by the Due Process Clause. Thus, a plaintiff complaining that his or her liberty interest in his reputation has been injured states an actionable claim under the Fourteenth Amendment only if he or she has suffered an additional deprivation.

The Due Process Clause requires at a minimum that any deprivation of life, liberty, or property by adjudication be preceded by notice and an opportunity for a hearing appropriate to the nature of the case. The procedural due process requirement on notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions, but the fair process of decisionmaking that such requirement guarantees works, by itself, to protect against any arbitrary deprivation of property. The due process requirements of the Fourteenth Amendment as to notice do not depend on the classification of actions as in rem or in personam, although more exacting requirements as to notice must be satisfied in an action in personam than in an action in rem or quasi in rem. A violation of a person's right of due process by failing to give him or her notice of the pendency of proceedings is not cured by granting the person a hearing on his or her motion to set aside the decree.

932 Character or type of notice

Notice by mail or other means that is certain to ensure actual notice is the minimum constitutional precondition to a proceeding which will adversely affect a liberty or property interest of any party. Under most circumstances, notice sent by ordinary mail is sufficient to discharge the government's due process obligations. Where an inexpensive and efficient mechanism such as mail service is available to enhance the reliability of an otherwise unreliable notice procedure, the state's continued exclusive reliance on an ineffective means of service is not, for due process purposes, notice reasonably calculated to reach those who could easily be informed by other means at hand. A posted service accompanied by mail service is constitutionally preferable to a posted service alone.

933 Language used in notice

Providing a notice written in the English language is normally deemed sufficient. To satisfy the constitutional requirement of due process, the notice afforded should, of course, be such as is likely to be received and plainly understood; but it need not be in a foreign language.

Observation: But evidence that a county housing authority lease clause permitting seizure and sale of a tenant's furniture and personal property without notice for nonpayment of rent was clear to one who can understand English, and an assertion by the housing authority that the lease terms had been explained to the tenant prior to signing the lease, were held insufficient to support a finding of a voluntary, intelligent, and knowing waiver of the constitutional right to notice and a hearing by an uneducated alien migrant farm laborer who spoke little English.

934 Sufficiency of notice

To meet the requirements of due process, the notice must be reasonable and adequate for the purpose, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it. A notice that is constitutionally sufficient is such as one desirous of actually informing the interested parties might reasonably adopt to accomplish it. Whether a particular method of notice is reasonable, for due process purposes, depends on the particular circumstances. In determining whether a particular method of notice is reasonable for due process purposes, a court must balance the interest of the state and the individual interest sought to be protected by the Fourteenth Amendment.

Observation: Foreign nationals, with respect to service of process, are assured of either: (1) personal service, which typically will require service abroad; or (2) substituted service that provides a notice reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action, and to afford them an opportunity to present their objections.

The notice which is an elementary and fundamental requirement of due process in any proceeding is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. In other words, it must give sufficient notice of the pendency of the action or proceeding and a reasonable opportunity to a defendant to appear and assert his or her rights before a tribunal legally constituted to adjudicate such rights. The notice must be of such a nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance; but if, with due regard for the practicalities and peculiarities of a case, these conditions are reasonably met, the constitutional requirements are satisfied.

Practice guide: After a person has been brought into a proceeding by notice, due process does not require notice of all subsequent steps in the proceeding.

Whether notice of subsequent proceedings is required is a matter of legislative discretion. However, entry of a judgment without notice may be a denial of due process, even where there is jurisdiction over the person and subject matter.

As specific examples of the foregoing general principles, a notice sent by a state agency to food stamp recipients, advising them of a change in the Food Stamp Act that would result in a reduction or termination of their benefits, and of their right to request a hearing if they disagreed with this action, but which failed to explain the precise impact of the change on each individual recipient, did not violate the requirements of the Due Process Clause of the Fourteenth Amendment. On the other hand, the absence of fair notice as to the reach of disbarment proceedings and the precise nature of charges against an attorney deprives the attorney of procedural due process when he is subjected to disbarment proceedings, where his disbarment is based on a charge of misconduct which was not in the original charges, but was added as result of testimony presented by him and his witness during disbarment hearings.
9. N.C. v. Anderson, 882 So. 2d 990 (Fla. 2004).

Psychiatrist's due process right to be notified of charges against him in professional disciplinary proceeding were violated, where state board of medicine's board of professional discipline's complaint charged psychiatrist with only one specific act of professional misconduct, which was having a sexual encounter with his patient, but board found that psychiatrist had engaged in sexually exploitative relationship and concluded that psychiatrist instigated a five-year relationship with patient that inappropriately promoted sexual feelings towards him, which had not been specifically charged in complaint. U.S.C.A. Amend. 14; I.C. ß 67-5242(1). Cooper v. Board of Professional Discipline of Idaho State Bd. of Medicine, 134 Idaho 449, 4 P.3d 561 (2000).

Failure of State Bar Commission to provide applicant seeking to take state bar examination with all-inclusive list delineating every reason on which Commission based its determination that applicant lacked requisite moral character for admission to state bar did not violate applicant's due process rights, where no charges were filed against applicant, and he was fully advised of reasons for which his application was denied. In re Converse, 258 Neb. 159, 602 N.W.2d 500 (1999).
REFERENCE: West's Key Number Digest, Constitutional Law [westkey]278(1.1), 284(2), 290(3), 305(2), 309, 312(4)
A.L.R. Index: Due Process;
A.L.R. Index: Notice and Knowledge
A.L.R. Digest: Constitutional Law ßß 611-614, 641-668

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935 Form and contents of notice

The notice must describe the nature of the proceeding which may affect the person notified. And, to be sufficient, the notice should state where and at what time the party is to proceed and the consequences of his or her failure to act as the law specifies. The notice essential to due process of law in such proceedings is original notice whereby the court acquires original jurisdiction, and not notice of the time when jurisdiction already completely vested will be exercised. A notice which does not afford a reasonable opportunity to be heard is insufficient.

Despite the foregoing, due process does not guarantee or prescribe any particular form of notice. It is impossible to set up a rigid formula as to the kind of notice that must be given under the Due Process Clause to inform parties of proceedings affecting their legally protected interests. The notice required will vary with the circumstances and conditions. Moreover, the content of the notice required by due process depends on appropriate accommodation of the competing interests involved. Although the relative weight of liberty or property interests is relevant to the form of notice required by due process, one way or another, some form of notice -- formal or informal -- is required before deprivation of a property interest that cannot be characterized as de minimis.

Observation: A form of notice which might be sufficient as to ordinary persons may be insufficient as to persons having special characteristics.

936 Voluntary, actual, or extraofficial notice where statute does not expressly require notice

The requirement of notice as a matter of right in accordance with due process of law is satisfied by a statute which either expressly or by necessary implication confers such right. But the statute itself must, to be constitutional, specifically require notice, since, in the absence of such a requirement, it will be deemed to authorize proceedings without notice. Thus, a law providing for proceedings which may effect a deprivation of life, liberty, or property must require notice or it will be unconstitutional, it being insufficient that the person affected may, by chance, have notice.

Observation: When a statute does not provide for notice, the voluntary giving of notice does not remedy the defect. Thus, where a statute authorizes the taking of private property, but makes no provision for a hearing or notice, either actual or constructive, such defect is not supplied by the voluntary adoption by public officers of rules covering the situation. It is not what notice, uncalled for by the statute, that a party may have received in a particular case that is material, but the question is whether any notice is provided by the statute.

Actual knowledge cannot operate as a substitute for the notice that is required by due process of law; hence, extraofficial or casual notice is not sufficient.

Observation: Due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take the necessary steps to preserve that right.

937 Necessity of actual personal notice

Personal service of written notice within the jurisdiction is the classic form of notice, always adequate in any type of proceeding to satisfy the requirements of due process, and in some actions or proceedings personal service of a notice or process may be an absolute requirement of due process. However, actual personal notice is not necessary in all proceedings, inasmuch as due process does not make personal notification indispensable if the notice is calculated to convey the information to the proper persons. If a party employs a procedure reasonably calculated to achieve notice, a successful achievement is not necessary to satisfy due process requirements. [n60]

938 Substituted or constructive service

There may be, and in fact must be, some form of constructive or substituted service, especially when actual service is impracticable, as where people are missing or unknown, so that justice will not be delayed or thwarted because of the plaintiff's inability to secure personal service.

The rule is that notice which is reasonable under the circumstances comports with due process, notwithstanding that the notice is not personally served. This is particularly true in regard to in rem proceedings. An action in rem, at least one strictly in rem, does not require any notice other than that which an owner of property receives in contemplation of law when his or her property is judicially seized. However, where one has alternative methods for giving notice, he or she is under a constitutional duty to select the alternative that is reasonably calculated to notify the adverse party, and may not select an alternative that he or she knows or should know will not notify the other party.

Notice by publication is not sufficient, under due process requirements, with respect to an individual whose name and address are known or easily ascertainable. Moreover, the law always favors a personal service, and countenances substituted and constructive notices only as a matter of necessity or extreme expediency. The principle is not that personal notice must always be given, but that it must be given where, from the nature of the case, it appears that no other notice is contemplated. Still, due process requires no more than a fair notice; and where every possible means of reaching a defendant has been exhausted, any further requirement of notice is unreasonable.

939 Time

The due process right to notice must be granted at a meaningful time and in a meaningful manner. Ordinarily, the notice must be given a sufficient length of time before the hearing to afford an opportunity to be present.

Other than satisfying a reasonableness standard, no precise rule has been, or could be, developed specifying precisely how much time is required for a proper notice to satisfy the Due Process Clause. However, a 21/2-hour notice to a landlord involved in a bankruptcy hearing is clearly inadequate. But a police officer's due process rights were not violated where the officer was informed of a suspension and hearing date six days before the hearing, where the officer's union received copies of the notice, and where the second notice established the date, nature, and location of the hearing and specified charges.

A notice which fails to give an adequate length of time is invalid, notwithstanding, by the local practice, that there will be several days' additional time before the case can be called for trial or default taken, or that the court in its discretion will probably set aside a default judgment and permit a defense. The procedural due process right to notice before deprivation of property must be granted at a time when the deprivation can still be prevented. No damage award for wrongful deprivation can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. While the authority of the legislature to prescribe the length of notice is not absolute and beyond review, it is certain that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time.

The very nature of the principle that notice must be given sufficiently in advance of the hearing to afford an opportunity to be present makes it clear that the question whether, from the viewpoint of time, there has been a sufficient compliance with the notice requirement which the due process guarantee imposes is determinable according to the facts and circumstances of particular cases. The timing of the notice required by due process depends on appropriate accommodation of the competing interests involved.

940 Delay or postponement of notice

Exceptions to the general rule, holding that due process requires notice and a hearing prior to a government action involving the deprivation of property rights occur only in extraordinary situations when some valid governmental interest is at stake, justifying postponing the hearing until after the event. For instance, due process is not denied where postponement of notice and hearing is necessary to protect the public from contaminated food, from bank failure, from misbranded drugs, to aid collection of taxes, or to aid a war effort. Nevertheless, "extraordinary situations" which will justify postponing due process notice and opportunity for a hearing until after the deprivation of property must be truly unusual.

Caution: Although an important governmental interest may justify postponement of the notice and hearing until after the initial taking of a protected property interest has occurred, due process is not satisfied by the availability of a collateral judicial remedy separate from the seizure procedure itself.

941 Persons entitled

Persons entitled to notice of a proceeding are, speaking generally, those who are to be affected by a judgment or order therein. Judicial action enforcing a judgment against the person or property of one who was not a party to the proceeding in which the judgment was rendered, and was not made a party by service of process, is not that due process which the Fifth and Fourteenth Amendments require. However, the notice need not be given to every party for every new step or in every supplementary proceeding in litigation. And the requirement of notice applies only to those whose substan-

tial interests are affected by the proceeding in question. Thus, where creditors of a corporation have no vested interest in its assets, they are not deprived of any property merely because a statute permitting the distribution of such assets to shareholders makes no provision for notice to them of any application therefor.

Entitlement of particular persons to notice in various specific types of proceedings, such as mental incompetents, prisoners, parents in adoption proceedings, and other persons, is treated in other articles.

942 In representative actions

In certain cases, notice to one party may, by reason of representation, be notice to another, at least so far as the representative relation is concerned. However, the doctrine of virtual representation must be applied cautiously in order to avoid infringing on the principles of due process because it forces the principles of res judicata on nonparties to a judgment. Heirs not in being or unknown and not represented by guardians ad litem at the time of a condemnation proceeding, for example, cannot be bound by condemnation judgments under the doctrine of virtual representation because the adult heirs did not receive approval of the condemnation court to represent their interests. In order that a judgment in a representative suit may be operative against nonparties, under the Due Process and Full Faith and Credit Clauses of the Federal Constitution, the procedure adopted must be such as fairly to ensure the protection of the interests of the absent parties; thus, in particular cases there may be a due process requirement of notice to absent members of the class represented in a representative suit, and such notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. And while notice to class members may be required under various circumstances even though there is no express statutory requirement thereof, the rule governing federal class actions contains certain provisions for notice intended to fulfill the requirements of due process. A statute which provides that jurisdiction to render judgment against an association which will bind the joint property of the associates may be acquired by service on one or more of its members is consistent with due process. And so far as constitutionality is concerned, there is no distinction between such a statute applied to partnerships and one applied to other unincorporated associations. When, however, it comes to actually reaching the individual property of a person, such as a stockholder in a corporation or a person in an association, notice is required. Notice to a corporation of demands by dissenting stockholders in connection with a vote to sell corporate assets complies with the constitutional requirement of due process of law, even though the effect of such a notice also is to bind the majority stockholders.

943 When notice not required

The cases in which notice may be dispensed with are few, and as a general rule, proceedings not founded on notice to the person affected are void. In certain cases, however, notice is not necessary; the very nature of particular proceedings may be such as to charge persons to be affected thereby with notice. For instance, the Due Process Clause does not require that potential plaintiffs be given notice of the impending expiration of a period of limitations contained in a state's self-executing statute of limitations. There may also be cases where persons to be affected by proceedings will not be entitled to notice and a hearing under the Due Process Clause because of a waiver thereof, whether by appearance in the proceedings or otherwise. In addition, no person has a procedural due process right to notice and a hearing, prior to the occurrence of any action that may affect him or her, unless the action is "state action" and, as such, threatens him or her with the loss of life, liberty, or property.

Notice may be dispensed with, without violating due process, in emergency situations in which the state is acting to further the public welfare. And when necessary to ensure the public safety, the legislature may under its police power authorize municipal authorities summarily to destroy property without legal process or previous notice to the owner, and without recourse against such authorities for the injuries so occasioned; so far as property is dangerous to the safety or health of the community, due process of law may authorize its summary destruction. Similarly, there is no denial of due process involved in the summary destruction, without notice, of property the possession of which is illegal.

Due process does not require notice to persons who arrange their affairs to conceal their interests, and does not require notice to beneficial, as opposed to legal, owners of real property; and no notice need precede any legislative action of general applicability in order for the action to survive a procedural due process challenge.

Observation: Due process does require at least a notice and an opportunity to be heard before the imposition of Fed R Civ P, Rule 11 sanctions, and therefore a District Court acts improperly when it raises and decides the issue on its own without any warning to counsel.

944 Waiver by appearance or other act

The due process right to notice prior to a civil judgment is subject to waiver. Such waiver may arise by reason of a person's voluntary appearance in the proceedings, whether general or special; if a person actually appears in the proceed-

ing, the notice becomes unimportant. There may also be cases where persons to be affected by proceedings will not be entitled to notice and a hearing under the Due Process of Law Clause, because of a waiver thereof by accepting a statutory privilege or making an application which the proceedings may follow as a consequence. [n19] One who has notice that his or her property is to be taken and an opportunity to contest the right to take it, but who chooses to disregard such notice, will not be heard to assert that his or her property has been taken without due process.

Consent by contract is an example of a valid written waiver of notice, and a person may agree by contract to be bound by extraterritorial service of process, even in a personal action. In addition, the Supreme Court has held that a cognovit clause in a note is not per se violative of Fourteenth Amendment due process, and that a valid cognovit clause is an effective waiver of the due process rights to notice and hearing. At the same time, however, the Supreme Court stated that its holding is not controlling precedent for other facts of other cases, warning that "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue." In any event, due process rights to prejudgment notice must be voluntarily, intelligently, and knowingly waived, with awareness of the legal consequences. But the inability of a debtor -- who had executed a note containing a cognovit clause authorizing the creditor, upon the debtor's default, to designate any attorney to waive the issuance and service of process and to confess judgment against the debtor in any state court of record -- to predict with accuracy how or when the creditor would proceed under the confession clause upon the debtor's default, does not in itself militate against an effective waiver of the debtor's due process rights to notice and hearing prior to entry of a judgment against him.

945 Necessity of hearing; in general

An opportunity for a hearing before a competent and impartial tribunal upon proper notice is one of the essential elements of due process. In fact, the basic constitutional requirement of due process of law is the right to be heard. Just as a state may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in proceedings without a hearing or opportunity to be heard, so it cannot, without disregarding the requirement of due process, give conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein. It is a violation of due process for a judgment to be made binding on a litigant who was not a party nor a privy, and therefore has never had an opportunity to be heard. A litigant must be given his or her "day in court"; conversely, one who is accorded his or her "day in court" before his or her property is affected may not complain that one has been denied due process of law.

946 Purpose of hearing

The due process right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his or her possessions. The purpose of such a requirement is not only to ensure abstract fair play to the individual, but more particularly is to protect his or her use and possession of property from arbitrary encroachment, minimizing substantively unfair or mistaken deprivations of property. Since the essential reason for the due process requirement of a hearing prior to deprivation of property is to prevent unfair and mistaken deprivations of property, such a hearing must provide a real due process test. The right of access to the courts is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.

947 Minimum due process requirements

An opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process requirement, and this right has little reality or worth unless one is informed that a matter is pending and can choose for himself or herself whether to appear or default, acquiesce, or contest. The right to be heard before being condemned to suffer a grievous loss of any kind is a principle basic to our society. The requirement of a hearing as a matter of right is satisfied by a statute which either expressly or by necessary implication confers such right.

Observation: The right to a hearing under the Due Process Clause does not depend on a demonstration of certain success, or upon the nature of the right violated, i.e., whether the right is a fundamental right or is state-created.

When the Fifth Amendment's Due Process Clause applies, the government may not penalize an individual without first providing an opportunity for rebuttal, including cross-examination.

948 Requirement of meaningful opportunity to be heard

The right to a hearing is one of the rudiments of fair play assured by the Fourteenth Amendment, and there can be no compromise on the footing of convenience or expediency when that minimal requirement has been neglected or ignored. The right to a meaningful opportunity to be heard, within the limits of practicality, must be protected against denial by particular laws which operate to jeopardize it for particular individuals. Thus, due process requires, at a minimum, that, absent a countervailing state interest of overriding significance, persons forced to settle their claims of right

and duty through the judicial process be given a meaningful opportunity to be heard. The opportunity to be heard in a meaningful time and in a meaningful manner may include the right to a predetermination hearing, absent emergency circumstances.

Observation: In order to determine whether a due process violation has occurred, a court must consider the entire spectrum of predeprivation and postdeprivation process provided by the state. In claims alleging that a state acted in accordance with established state procedure, due process is not satisfied even if a meaningful postdeprivation process is available.

The requirement of due process that a person be able to be heard at a meaningful time and in a meaningful manner is just as applicable when a person alleges a deprivation of liberty without due process as when he or she alleges a deprivation of property without due process.

949 Requirement that hearing follow a particular format

No fixed format, process, or procedure is demanded for a due process hearing. A weighing process is part of any determination of the form of hearing required in particular situations by procedural due process, it being permissible for the hearing's formality and its procedural requisites to vary, depending upon the importance of the interests involved and the nature of any subsequent proceedings. For purposes of due process, it is not required that whenever a protectable interest is involved there be some form of traditional adversary, judicial, or administrative hearing before or after deprivation of the interest; due process is flexible, calling for such procedural protections as the particular situation demands, and just as there is no requirement as to exactly what procedures to employ whenever a traditional, judicial-type hearing is mandated, there is no reason to require a judicial-type hearing in all circumstances. Ordinarily, due process requires an opportunity for some kind of hearing prior to deprivation of a significant property interest, but summary administrative action may be justified in emergency situations. Therefore, the nature and form of a hearing are legitimately open to many potential variations and are a subject for legislation, not adjudication.

Absent a property or liberty interest, there is no due process right to a predeprivation hearing, but when interests involving liberty and property rights protected by the Fourteenth Amendment are implicated, the right to some kind of prior hearing is paramount.

Although the due process requirement as to a prior hearing before a deprivation of property tolerates variances in the form of a hearing appropriate to the nature of the case and depending upon the importance of the interest involved and the nature of the subsequent proceedings, if any, nevertheless whatever its form, an opportunity for such a hearing must be provided before the deprivation at issue takes effect, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing.

Observation: The constitutional requirement of an opportunity for some form of hearing before deprivation of an interest encompassed by the Fourteenth Amendment's protection of liberty and property does not depend upon any narrow balancing process.

950 Hearings on property rights

It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, and this reliance must not be arbitrarily undermined; it is a purpose of the constitutional right to a hearing, protected by procedural due process, to provide an opportunity for a person to vindicate those claims. In the ordinary case a citizen has a right to a hearing to contest the forfeiture of his or her property, a right secured by the Due Process Clause, and implemented by a federal rule.

Outright seizure of property is not the only kind of deprivation that must be preceded by a prior hearing required under due process. And even though a deprivation of property is temporary and nonfinal, it constitutes a "deprivation" in the terms of the Fourteenth Amendment, and must be preceded by a fair hearing. Any significant taking of property by the state is within the purview of the Due Process Clause; and while the length and consequent severity of a deprivation may be a factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.

The due process right to be heard prior to any deprivation of property does not depend upon an advance showing that one will surely prevail at the hearing; the simplicity of the issues involved in determining the ultimate right to continued possession of the property may be relevant to the formality and scheduling of the prior hearing, but it cannot undercut the right to a prior hearing of some kind. The test for due process in the sense of procedural minima requires a compari-

son of costs and benefits of whatever procedure the plaintiff contends is required. However, the ordinary costs in time, effort, and expense imposed by a hearing cannot outweigh the constitutional right to a hearing prior to deprivation of property, since due process cannot be measured in minutes and hours or in dollars and cents.

The refusal of a court to hear and decide a case before it when there are no other courts competent to hear such case can amount to a denial of due process under the Fourteenth Amendment. But the inability of certain landowners to sue the state, because of the doctrine of sovereign immunity, for damage to their property by the state, does not necessarily involve a denial of due process of law.

951 Specific examples of situations requiring hearing

The requirement of a hearing in accordance with due process of law has been applied to a wide variety of proceedings, persons, and subjects, including, but not limited to:

.the risks of error inherent in a decision to have a child institutionalized for mental health care;

.the taking of private property, the revocation of licenses, the operation of state dispute settlement mechanisms, or the right to government-created jobs held absent any "cause" for termination;

.confinement that rests on the theory of civil contempt;

.termination of parental rights to children;

.depriving a citizen of his or her driver's license and vehicle registration;

.termination of public assistance payments;

.deprivation of one's wages through garnishment; and

.expulsion of a student from a state university or college.

952 Conditions and restrictions

Reasonable conditions may be imposed on the right to a hearing or to access to the courts generally, such as requiring security, since an individual's due process right to an opportunity to be heard does not ensure a hearing in all contexts.

Durational residency requirements as a condition precedent to bringing certain types of actions, such as those for divorce, have been sustained. The imposition upon the losing party of attorneys' fees for the adversary who prevailed will not ordinarily be a violation of due process of law. That a rule of procedure may work a particular hardship on a particular defendant does not make the rule wanting in due process. And due process of law is not denied by a statute providing for summary judgment in certain classes of cases unless a proper affidavit of merits is filed, though it applies only to actions based upon contracts, judgments, and statutes, and not to other kinds of actions, since in such others there are questions of fact for the jury as to the existence of liability or the amount of damages. The Supreme Court has ruled that due process of law does not compel a state to open its courts to suits by foreign corporations on transitory causes of action occurring elsewhere.

Even so, the requirements of due process are not met where the right to a hearing is granted only on conditions so harsh and oppressive as to be tantamount to a denial of the right. Generally speaking, it can be said that state restraints upon access to the courts will be invalidated when they are so arbitrary, unequal, and oppressive as to shock the sense of fairness the Fourteenth Amendment was intended to satisfy.

Requirements involving payment of filing or other court fees and costs have produced conflicting results when challenged on due process grounds. On the one hand, the Supreme Court has held that a state denies due process of law to indigent persons by refusing to permit them to bring divorce actions except on payment of court fees and service-of-process costs which they are unable to pay. Similarly, a state court has held that since the right to raise one's children is fundamental, a court cannot order an indigent natural parent to pay filing fees and transcript preparation costs in her appeal from a juvenile court ruling that her children were dependent, thereby denying the petitioner her statutory right of appeal solely because of her indigency. On the other hand, the Supreme Court has also held that a requirement that an indigent pay filing fees for voluntary bankruptcy was not unconstitutional. The Supreme Court has also ruled that indigent welfare recipients could be denied judicial review of an administrative ruling reducing their payments unless they paid a specified court filing fee.

953 Character and sufficiency; in general

The proceeding or hearing requisite to due process must be appropriate, fair, adequate, and such as is practicable and reasonable in the particular case. However, due process does not necessarily require any particular kind of hearing.

954 Requirement of full evidentiary hearing

A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. But a full adjudication, including presentation of witnesses and cross-examination, need not be provided in every case where a hearing of some kind prior to termination of a property interest is required by due process or provided by statute. Thus, due process rarely demands full evidentiary hearings. The timing and nature of the required hearing under the Due Process Clause will depend on an appropriate accommodation of the competing interests involved, including the importance of the private interest and length or finality of deprivation, likelihood of government error, and magnitude of governmental interests involved. However, it must be an orderly proceeding, adapted to the nature of the case, in which the person to be affected has an opportunity to defend, enforce, and protect his or her rights.

Insofar as administrative proceedings are concerned, ordinarily, for purposes of due process, something less than an evidentiary hearing is sufficient prior to adverse administrative action. Although some kind of prior hearing may be necessary to guard against arbitrary impositions on interests protected by the Fourteenth Amendment, nevertheless where the state has preserved what has always been the law of the land, the case for administrative safeguards is significantly less compelling. And when a proceeding is quasi-legislative in character, due process does not require a hearing of the judicial type.

955 Presence of person; counsel

A party to a civil action is entitled to be present in the courtroom, and to be represented by privately retained counsel at all stages during the actual trial of the action; this does not mean, however, that it is essential to the jurisdiction of the court that the parties be present at all times during the trial, but simply that this right cannot be denied them. They must be given the opportunity to be present, but if that opportunity is given, their absence during the trial does not affect the right to proceed. The right to privately retained counsel in civil cases is no less fundamental than the Sixth Amendment's right to counsel in criminal cases, and springs from both statutory authority and from the constitutional right to due process of law. However, the right to represent oneself in a civil case is not one of the fundamental rights protected by the Due Process Clause of the Fourteenth Amendment.

The right of a party to a civil action to be represented by counsel before the court upon the law and before the jury as to facts at all stages of the trial is unquestioned, and the arbitrary refusal of any court to hear a party by counsel employed by and appearing for him or her would be a denial of a hearing and in a constitutional sense a denial of due process. In civil matters the right to a hearing, as is commonly stated, is more accurately a right to an opportunity for a hearing. Obviously, the presence of the person affected by the judgment is not required if he or she has been given notice. A valid and binding judgment may be rendered upon the default of the defendant. With respect to criminal proceedings, the presence of the defendant is considered a fundamental right, and denial of such right may violate the guarantee of due process, although it has been held that the presence of the defendant is a condition of due process under the Fourteenth Amendment to the extent that a fair and just hearing would be thwarted by the defendant's absence, and to that extent only; conversely, where defendant's presence at his trial will be useful or of benefit to him and his counsel, the lack of his presence becomes a denial of due process of law.

Observation: There is no basis for concluding that, under the Due Process Clause of the Fifth Amendment, a federal statute which limits the amount of attorneys' fees that can be paid to an attorney representing plaintiffs denies the due process right to counsel.

In accordance with the Sixth Amendment to the United States Constitution and similar provisions in the constitutions of most states, a person accused of a crime has the right to be heard and to be assisted by counsel in his or her defense, and under these provisions a defendant is entitled to have an attorney appointed by the court to act in his or her behalf, or to be given a fair opportunity to secure counsel of his or her own choice. A defendant may also choose to represent himself or herself in criminal proceedings. The constitutional right to appointed counsel provided for in the state and federal constitutions is guaranteed only in criminal prosecutions, and the guarantee ordinarily does not, by virtue of the specific language of these provisions, apply to civil proceedings. Thus, the right to appointment and assistance of counsel in various types of civil or administrative proceedings has generally been denied, although the United States Supreme Court has carved out numerous exceptions to this rule for the purposes of the United States Constitution.

956 Right to raise issues and defenses

Due process requires that a party that may be affected by a proceeding shall have the right to raise such issues or set up any defense which he or she may have in the cause. Thus, as an example, a municipality's policy of automatically suspending from the employment application process those veterans who were not honorably discharged from the service denies such applicants who received a general discharge the hearing requirement of the Due Process Clause, since the applicants are not afforded an opportunity to demonstrate that the reasons for which they received a general discharge bear no relationship to their ability to be firefighter.

The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues. A hearing which does not give the right to interpose reasonable and legitimate defenses cannot constitute due process of law. Indeed, the United States Supreme Court has said that due process requires that there be an opportunity to present every available defense. However, the Supreme Court also has held that due process is not violated by state procedures denying defendants the opportunity to put in defenses in that action, so long as their claims can be raised elsewhere within the judicial system. Thus, the Court has held that a state can enact legislation denying tenants in eviction suits brought by landlords the right to show that the landlords had failed to make repairs as required by a contract or the statute. Nevertheless, the Court has also recognized that a landlord-tenant dispute, like any other lawsuit, cannot be resolved consistently with due process of law unless both parties have had a fair opportunity to present their cases.

957 Time of hearing

Due process does not always require a state to provide a predeprivation hearing prior to an initial deprivation of property. However, in situations where a state can feasibly provide a predeprivation hearing before taking property, it generally must do so, regardless of the adequacy of any postdeprivation tort remedy to compensate for the taking. Although a party must not be deprived of his or her property without a judicial hearing, the stage of the proceedings at which that hearing shall take place and the manner in which the cause of a party shall be brought before the judicial tribunal, provided it is not an unreasonably inconvenient and embarrassing one, are matters within the legislative power. Although due process of law implies not merely an opportunity to be heard, but also an opportunity to be heard with reasonable promptness, where only property rights are involved, the usual rule is that the mere postponement of a judicial inquiry into liability is not a denial of due process if the opportunity given for the ultimate judicial determination of the liability is adequate. Whether a situation warrants postponement of a predeprivation hearing depends on a balancing of the importance of the private interest affected by the governmental action, the government's interest, and the risk of an erroneous deprivation. Thus, an important governmental interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demand prompt action justifying postponing the opportunity to be heard until after the initial deprivation. In determining how long a delay is justified in affording a postsuspension hearing and decision, it is appropriate to examine the importance of the private interest and harm to that interest occasioned by the delay, the justification offered by the government for the delay and its relation to the underlying governmental interest, and the likelihood that the interim decision may have been mistaken. Similarly, while a prior hearing is normally a prerequisite to the state's interference with a person's liberty, it may be delayed until some time after the deprivation has taken place, particularly where there is a compelling state interest to warrant the postponement. Nonetheless, extraordinarily long delays may render a postdeprivation remedy inadequate for purposes of due process analysis.

Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances. Generally, due process of law is afforded litigants if they have an opportunity to be heard at any time before a final judgment is entered. The exact time is not, so far as due process is concerned, a material consideration. The view has also been taken that due process does not require an opportunity to present defenses before the entry of judgment, and that it is sufficient if an appeal is provided or another method of review available. The required hearing is afforded where the judgment or order affecting liberty or property, although not itself preceded by a hearing, is reviewable in proceedings in which there is the right to be heard. However, the view that due process does not require an opportunity to be heard before judgment if defenses may be presented upon appeal assumes that the appellate review affords an opportunity to present all available defenses, including a lack of proper notice, to justify the judgment or order complained of.

As specific examples of the foregoing general principles, homeowners were held to be not deprived of their property rights without due process by the attachment of their homes by home repair contractors pursuant to a state's prejudgment attachment statute which did not require a predeprivation hearing or the posting of a security bond. The same view has been taken in certain types of tax and garnishment matters. But a state's prejudgment replevin laws which authorize a summary seizure of goods or chattels by state agents upon an ex parte application of a private person who merely

posts a bond for double the value of the property, and who files an affidavit of the value of the property, violate the Fourteenth Amendment's guarantee that no state shall deprive any person of property without due process of law, insofar as the state's laws deny the possessor the right to a prior opportunity to be heard before the chattels are taken from him or her, notwithstanding that the possessor may regain possession by filing a counterbond within three days after the seizure, and notwithstanding that he or she may obtain a postseizure hearing by initiating a lawsuit.

The procedural due process right to a hearing before deprivation of property must be granted at a time when the deprivation can still be prevented; no later hearing and no damage award for wrongful deprivation can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. Under the principle that the formality and procedural requisites for a due process hearing can vary, depending on the importance of the interest involved and the nature of the subsequent proceedings, the possible length of wrongful deprivation of benefits is an important factor in assessing the impact of official action on the private interests; hence, the rapidity of administrative review of the denial of benefits is a significant factor in assessing the constitutional sufficiency of the entire process. But due process is not denied where postponement of a hearing is necessary to protect the public from contaminated food, from a bank failure, from misbranded drugs, to aid the collection of taxes, or to aid the war effort.

Observation: A state statute requiring, in eviction proceedings for nonpayment of rent, that trial be held between two and six days after service of the complaint unless security for accruing rent is provided, is not invalid on its face under the Due Process Clause of the Fourteenth Amendment; in those recurring cases where the tenant fails to pay rent or holds over after expiration of his or her tenancy and the issue in the ensuing litigation is simply whether he or she has paid or held over, it cannot be declared that the statute allows an unduly short time for trial preparation.

958 Proceedings in which hearing not required

The Supreme Court has said that due process of law does not require a hearing in every conceivable case of government impairment of a private interest, and that due process does not require that the defendant in every civil case actually have a hearing on the merits. The Court has also said that there are exceptions to the general rule holding that due process requires a notice and hearing prior to a government action involving the deprivation of property rights, and that these exceptions occur only in extraordinary situations when some valid governmental interest is at stake, justifying postponing the hearing until after the event. A party's due process right to a hearing, prior to entry of an order affecting the party's interest, is limited to cases in which a hearing would assist the court in its decision. Further, it has been stated that the due process right to a prior hearing attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection, and even then only where there is no alternative forum in which vindication of that constitutionally protected right may be sought.

In limited circumstances, immediate seizure of a property interest, without an opportunity for a prior hearing, is constitutionally permissible, where: (1) the seizure is directly necessary to secure an important governmental or general public interest; (2) there is a special need for very prompt action; and (3) the state keeps strict control over its monopoly of legitimate force, that is, the person initiating the seizure is a government official responsible for determining, under the standards of a narrowly drawn statute, that a seizure without a prior hearing is necessary and justified in the particular instance. Thus, for instance, if public safety is at issue, liberty or property interests can be deprived even without a prior hearing.

When a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption, inasmuch as the Constitution does not require all public acts to be done at town meetings or an assembly of the whole, and general statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard, their rights being protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rules.

Many acts of government are validly exercised without a hearing, especially if the matter is subject to revision in the courts; and no opportunity to be heard need precede any legislative action of general applicability in order for the action to survive a procedural due process challenge. Thus, legislation which meets the test of a proper exercise of the police power will not be struck down on the ground that because of deficiencies respecting notice and hearing it does not comport with the requirements of due process. And in connection with matters over which the state has plenary power, rights may be affected without the hearing normally required by due process.

959 Waiver or loss of right

The due process right to a hearing prior to a civil judgment is subject to waiver, provided such waiver is made voluntarily, intelligently, and knowingly, and with awareness of the legal consequences. Such a waiver may arise by contract, as

in the case of a debt instrument containing a cognovit provision, authorized under state law, whereby the holder, upon the debtor's default, could designate any attorney to waive the issuance and service of process and to confess judgment against the debtor in any state court of record, or it may arise by a consent decree entered into by the parties to a case after careful negotiation. But the right of a minor to a hearing in certain cases affecting such minor's personal liberty may not be waived by a parent or guardian, as in the case of commitment to a state mental hospital or certification and commitment as a narcotics addict.

Any right to a hearing may also be lost by delay. There is no denial of due process in a provision that, if the person affected takes no steps to assert his or her rights within four years after the judicial assertion of an adverse title, he or she shall lose those rights. The fact that external circumstances may prevent a defendant from availing himself or herself of the opportunity to defend does not render a summary judgment law unconstitutional as denying due process. Nor does the fact that opportunity for a hearing was lost because misapprehension as to the appropriate remedy was not removed by judicial decision until it was too late to rectify the error furnish the basis for a claim that due process of law has been denied. A state can enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication. Thus, one who has refused to cooperate in the hearing by submitting to the court evidence which is required for a just decision cannot be heard to claim the right of a hearing.

960 Generally; necessity of evidence

In an adjudicative context, due process entitles a person to a factfinding based on the record produced before a decisionmaker and disclosed to that person, and an individualized determination of his or her interests. It also requires that the decisionmaker actually consider the evidence and the argument that the party presents. Due process is ordinarily absent if a party is deprived of his or her property or liberty without evidence having been offered against him or her in accordance with established rules, except in those rare instances where countervailing government interests dictate that such information should remain secret.

Under the Due Process Clause of the Federal Constitution, an opportunity to submit evidence to rebut charges or adverse claims and testimony is an essential requirement of a full and fair hearing. To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence, a conclusion from the evidence as to where the truth lies, the application of the appropriate laws to the facts found, and the rendition of judgment accordingly.

Observation: It is important to remember that a retrospective case-by-case review cannot preserve fundamental fairness when a particular class of proceedings is governed by a constitutionally defective evidentiary standard.

Many administrative determinations may be made only after evidence has been taken, and in such cases the decision made must have support in the evidence received, although the Due Process Clause does not require an administrative body to specify the particular evidence on which a discretionary determination was made. Similarly, it is a violation of due process to convict and punish a person without evidence of guilt. The Due Process Clause of the Fourteenth Amendment also forbids fundamental unfairness in the use of evidence, whether true or false. Thus, it is the settled view of the Supreme Court that a conviction obtained in a state court by means of a coerced confession deprives the defendant of liberty without due process of law. Similarly, the Supreme Court has held that as a matter of due process, evidence obtained by a search and seizure in violation of the Fourth Amendment is inadmissible in a state court, as it is in a federal court. And it is an immutable principle of jurisprudence that where a governmental action seriously injures an individual and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case, documentary evidence, and, even more importantly, testimony must be disclosed to the individual so that he or she has an opportunity to show that it is untrue. Suppression or withholding by the state of material evidence exculpatory to the accused is a violation of due process.

961 Right to introduce evidence

The right under the Due Process Clause to a full hearing includes the right of the party whose rights are sought to be affected to introduce evidence and have judicial findings based upon it, except in instances where the evidence in question may mislead or confuse a jury. A party has a right to the opportunity, when in court, to establish any fact which, according to the usages of common law or provisions of the Constitution, would be a protection to his or her property or liberty. Due process implies the right to contradict by proof every material fact which bears on the question of right involved. The exclusion of competent and relevant evidence on the ground that the trial court is in possession of the evidence, although it is not in the record, is not due process. And it is established that there is no hearing in the constitutional sense where the party does not know what evidence is being offered or considered and is not given an opportunity

to test, explain, or refute such evidence. Due process does not, of course, require a court to accept every sworn allegation as true.

The right to be heard and to produce evidence has been held not to include any inherent right on the part of a litigant to offer oral evidence in support of his or her cause of action or defense; written evidence may be required in some cases. If all facts and suggestions deemed necessary are presented by affidavits and in writing, the exclusion of oral evidence is not a violation of the guarantee of due process.

Observation: A state junior college was not denied due process when the president of the State Higher Education Services Corporation adopted, without any evidentiary hearing, the findings of the comptroller that some college students had not met the school's entrance requirements, thereby necessitating disallowance of a portion of the college's current tuition assistance, where the college had an opportunity to, and did, submit numerous written responses to the findings.

The right to present proof and argument is applicable in adjudicatory administrative proceedings and in many cases even in informal hearings involving a person's right to remain employed. A party is entitled to know the issues on which an administrative decision will turn and to be apprised of the factual material on which an administrative agency relies for its decision so that he or she may rebut it; the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation; but these salutary principles do not preclude a factfinder from observing strengths and weaknesses in the evidence that no party identified. An administrative decision is not subject to due process attack on the ground that immaterial and prejudicial evidence was introduced where nothing sustains the conclusion that the administrative agency relied upon such evidence.

In the case of a review of the orders of commissions, boards, and the like, provision is frequently made for the hearing of the case in the court of review upon the testimony adduced before the commission or board. If the party affected has the right on the hearing before the board or commission to introduce evidence as to all material points, such a limitation of the evidence on review does not violate the due process guarantee.

962 Right to confront and cross-examine witnesses

The right to confront and cross-examine witnesses is a fundamental aspect of procedural due process, and such right applies not only in criminal proceedings, but also in noncriminal proceedings, including administrative or quasi-judicial proceedings. The Supreme Court has pointed out, however, that confrontation and cross-examination are not rights universally applicable to all proceedings. An opportunity to take depositions of witnesses prior to a trial or hearing is not a requirement of due process, although the right to take depositions is in some instances made the subject of statutory regulation, or even of a constitutional provision. The compulsory attendance of witnesses, both in a criminal and civil trial, is also a vital part of the American concept of due process and a fair hearing. But the government's recognition of its interest in having persons appear in court by paying them for their participation in judicial proceedings does not require, under the Due Process Clause of the Fifth Amendment, that it make payment of the same nature and extent to persons who are held available for participation in judicial proceedings should it prove to be necessary; that the government pays for one stage does not require that it pay in like manner for all stages.

963 Prescribing rules of evidence

The legislature of a state has the power to prescribe new, and alter existing, rules of evidence, or to prescribe methods of proof, provided they do not violate constitutional requirements or deprive any person of his or her constitutional rights. Moreover, so long as they do not violate any constitutional provision or deprive a litigant of his or her constitutional rights, the rules of evidence are subject to the control of, and modification by, the legislature, regardless of whether they affect existing rights, there being no such thing as a vested right in a rule of evidence. If a legislative provision, not unreasonable in itself, prescribing a rule of evidence in either criminal or civil cases, does not shut out from the party the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him or her; however, the legislature has no power to establish rules which, under the pretense of regulating evidence, altogether prohibit a party from exhibiting or establishing his or her rights, since this would substantially deprive him or her of due process of law. Congress has undoubted power to regulate the practice and procedure in federal courts, including authority over the promulgation of evidentiary rules, and it may exercise that power by delegating to the Supreme Court or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States. But when it comes to evidentiary rules in matters not within specialized judicial competence or completely commonplace, it is primarily for Congress to amass the stuff of actual experience and cull conclusions from it.

964 Presumptions and burden of proof; generally

No presumptions flow from mere allegations; no one can be required, consistent with due process, to prove the absence of violation of law. The Supreme Court has said that the presumption of innocence, although not articulated in the United States Constitution, is a basic component of a fair trial under our system of criminal justice. Presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment so long as the lack of precise equivalence does not exceed the bounds substantially tolerated by the applicable level of scrutiny. That such provisions may thus reflect a "secondary" purpose of Congress is of no moment.

A standard of proof, as required by the Due Process Clause of the Fourteenth Amendment and the needs for factfinding, instructs the factfinder concerning the degree of confidence society thinks he or she should have in the correctness of factual conclusions for a particular type of adjudication, and a standard of proof allocates the risk of error between the litigants and indicates the relative importance attached to the ultimate decision.

It is normally within the power of a state to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion; its decision in this regard is not subject to proscription under the Due Process Clause of the Fourteenth Amendment unless it offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental. And it is within the power of a legislative body to shift the burden of proof in civil cases, provided the statute or ordinance is reasonable. But the courts have not hesitated to strike down state statutes unfairly shifting the burden of proof. Because of the danger of injustice when decisions lack the procedural safeguards that form the core of constitutional due process, the use of undisclosed information in an adjudication should be presumptively unconstitutional.

Observation: As to what constitutes compliance with due process requirements, so far as the burden of proof in commitment proceedings for the mentally ill is concerned, the Supreme Court has held that the due process guarantees of the Fourteenth Amendment require a "clear and convincing" standard of proof in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital. A mere "preponderance of the evidence" standard is not sufficient. However, due process does not require a state to apply the strict, criminal standard of "beyond a reasonable doubt" or to use the term "unequivocal" in conjunction with the terms "clear and convincing." On the other hand, the Court has held that a preponderance standard for paternity proceedings rests on legitimate and significant distinctions between termination and paternity proceedings, in that: (1) there is an important difference between the ultimate results of a judgment in the two proceedings; (2) there is an important distinction between the parties' relationship to each other in the two proceedings; and (3) there is an important difference in the finality of judgment in favor of the defendant in a termination proceeding and in a paternity proceeding.

The Supreme Court has held that, before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence, and that a standard of proof requiring a jury to be "reasonably satisfied from the evidence" before it could impose punitive damages under state law, when buttressed by other existing procedural and substantive protections, is sufficient for the purposes of the Due Process Clause, notwithstanding that there is much to be said in favor of requiring a higher standard of proof.

Observation: The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the fact finder concerning the degree of confidence our society thinks he or she should have in the correctness of factual conclusions for a particular type of adjudication" and to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision. The standard of "clear and convincing" proof is an intermediate standard somewhere between the standard of proof "beyond a reasonable doubt" and a "preponderance of the evidence."

965 Creation of statutory presumptions

In order that a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. Statutes creating permanent irrebuttable presumptions do not per se violate due process. A statutory presumption need not be accurate in every imaginable case, for purposes of constitutionality in terms of due process.

The validity, for purposes of due process, of inferences and presumptions varies from case to case, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the de-

vice curtails the factfinder's freedom to assess the evidence independently. And since the process of determining the rationality of the connection between a fact proved and an ultimate fact presumed is, by its nature, highly empirical, significant weight should be accorded the legislative capacity to amass the stuff of actual experience and cull conclusions from it in matters not within specialized judicial competence or completely commonplace. Also, in assessing the constitutionality of evidentiary presumptions for purposes of due process, legislative judgments such as ones in which the drafters of an analogous presumption explained the basis for that presumption deserve respect. Thus, a statute may declare any circumstance or evidence, however slight, prima facie proof of a fact to be established, leaving the adverse party at liberty to rebut and overcome it by contradictory and better evidence. The power of the legislature to create presumptions is not, however, a means of escape from constitutional restrictions. Illustratively, the legislature may stipulate that the fact of an injury, under certain circumstances, is prima facie evidence of negligence, and such legislation has been upheld as against the contention that it is unconstitutional as a deprivation of property without due process of law; but where a statute makes proof of one fact or group of facts prima facie evidence of negligence, it is invalid, as violating the Due Process Clause, if there is no rational connection between what is proved and what is inferred. Various other statutory presumptions, challenged on due process grounds, have been sustained, but in some cases specific presumptions have been held to be lacking in the requisite rationality or reasonableness.

It is also within the power of the legislature to establish presumptions of law which are irrebuttable, although statutes declaring one fact conclusive evidence of another material fact in controversy are unconstitutional if the former is not, in and of itself, by virtue of its own force, conclusive. Thus, it is generally recognized that a law cannot constitutionally provide that certain facts shall be conclusive proof of guilt, at least where this would amount to the giving of an artificial and evidentiary force to certain facts which otherwise would be wholly irrelevant and inconclusive, since the Fourteenth Amendment stands in the way of state legislative, and the Fifth Amendment in the way of congressional, establishment of irrebuttable presumptions depriving individuals of their rights. Thus, conclusive presumptions have frequently been held to violate due process. A state's interest in administrative ease and certainty cannot, in and of itself, save a conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the state's objective is premised.

Observation: In deciding whether an inference or presumption involved in a case is permissive or mandatory for purposes analyzing its validity in terms of due process, jury instructions reflecting the presumption or inference will generally be controlling, although their interpretation may require recourse to the statute involved and the cases decided under it.

966 Generally

The Due Process Clause does not force the conclusion that one has a constitutional right to a hearing before a tribunal of one's own choosing. However, it does require a fair hearing before an impartial court or other tribunal having jurisdiction of the cause. The tribunal must be appointed by law and be governed by rules of law previously established. It must be a legally constituted body for determining the right in question.

Unless jurisdiction exists, the judgment rendered is not by due process of law, and is ineffectual for any purpose; no rights are in any way affected by it, from it no rights can be derived, and all proceedings founded thereon are void and are not entitled to any respect in any other tribunal. To comply with the Due Process Clause, all assertions of state court jurisdiction, including in rem and quasi in rem actions, must be evaluated according to the minimum contacts standards set forth in decisions regarding in personam actions; the presence in the state of property alone will not support the state's jurisdiction where the property is unrelated to the cause of action.

967 Necessity of judicial tribunal

Under ordinary circumstances, the constitutional guarantee as to due process implies a formal judicial proceeding. Due process also requires a neutral and detached judge in the first instance, and the command is no different when a legislature delegates adjudicative functions to a private party. In fact, most of the definitions refer to judicial proceedings as an element of due process of law. Nevertheless, it is settled that such proceedings are not an indispensable requisite in all cases. It is accordingly said that the term "proceeding" means such an exercise of the powers of government as the settled maxims of the law permit and sanction, under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs.

In many matters the tribunal requirement of due process may be met by an administrative board or commission, or an executive, or an administrative officer, or a notary public, an alien deportation hearing conducted by an administrative board, a grievance committee, or a hospital medical staff. Even when confinement is a possible penalty, the Due Process Clause of the Fourteenth Amendment does not preclude a trial before a nonlawyer judge where a trial de novo before a

lawyer judge is available. Due process does not require that a party be present at an administrative hearing, but it does require a notice of the charges and an opportunity to be heard.

968 Requirements of fairness and impartiality

Due process requires that the tribunal be a fair and impartial one. The very notion of a hearing, under the Due Process Clause of the Fourteenth Amendment, however informal, connotes that the decisionmaker will listen to arguments of both sides before basing his or her decision on the evidence and legal rules adduced at the hearing. Mere friction between a court and counsel does not constitute bias.

These basic requirements of due process are applicable in administrative hearings, as well as in trials to a judge, as well as in criminal proceedings, including military courts-martial. It is a general rule of ethics that no person or body of persons should sit in judgment in cases and proceedings in which they are interested, and violation of this rule by persons presiding over causes triable in ordinary courts of justice amounts to a denial of due process of law to those who are injuriously affected.

The Due Process Clause is concerned not only with the actual bias of judges and jurors, but also with the need for the appearance of justice. Generally, an adjudication that is tainted by bias cannot be constitutionally redeemed by a review in an unbiased tribunal. Thus, subsequent state court procedures, even if they include a de novo review, cannot "cure" bias in the initial adjudication. Cases in which the adjudicator has a pecuniary interest in the outcome, or in which he or she has been the target of personal abuse or criticism from the party before him or her, have been said to be situations where the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable under due process of law. And a statute which compels a litigant to submit his or her controversy to a tribunal of which his or her adversary is a member does not afford due process of law. Nevertheless, there are certain exceptions to this proposition springing from the necessity of the situation. Thus, for instance, it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions the second time around.

The procedure whereby the members of federal administrative agencies receive the results of investigations, approve the filing of charges or formal complaints instituting enforcement proceedings, and then participate in the ensuing hearings, violates neither the Administrative Procedure Act (5 USCA ßß 551 et seq.) nor due process of law. A state professional examining board stays within the accepted bounds of due process where, after the board conducts an investigation, it issues findings and conclusions asserting the commission of certain acts and ultimately concludes that there is probable cause to believe that a member of the profession has violated state statutes. Also, since the initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes, the fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation. But while the combination of investigative and adjudicatory functions in an administrative agency does not, without more, constitute a due process violation, a court is not thereby precluded from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.

969 Pecuniary interest of judicial officer

Before one may be deprived of a protected interest, whether in a criminal or civil setting, one is entitled as matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average man as a judge, which might lead him or her not to hold the balance nice, clear and true. Impartiality is lacking where a member of the tribunal has a pecuniary interest in the outcome of the proceeding.

Many courts have held that the guarantee against deprivation of life, liberty, or property without due process of law, which is expressed in the Fourteenth Amendment to the Constitution of the United States and in similar state constitutional provisions, requires disqualification of a judge, justice of the peace, or similar judicial officer who is shown to have a pecuniary interest in the fines, forfeitures, or fees payable by litigants before him or her. It has also been held that a state statutory provision for the disqualification of interested, biased, or prejudiced judges, which required an accused to show special prejudice in his or her particular case, was an insufficient safeguard of an accused's constitutional right to trial before a disinterested judicial officer. However, there is authority which, while recognizing the principle that a judge, justice of the peace, or similar judicial officer may be disqualified by reason of a pecuniary interest in the fines, forfeitures, or fees payable by litigants, nonetheless holds that the existence of procedural safeguards available to a litigant can afford him or her due process of law despite a method of compensating the judicial officer by fees payable by litigants.

970 Protection against arbitrary rulings

Due process of law protects against arbitrary action. However, what is such arbitrary action depends upon the facts of the case, although no violation is involved in action which is merely erroneous.

Observation: Surprise as to a decision and the grounds thereof does not necessarily indicate a want of due process.

971 Generally; rehearing or new trial

The Federal Constitution does require due process of law, but it does not require an endless number of opportunities for one to assert or reassert his or her rights. A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is generally all that can be adjudged vital under the guarantee of due process of law. Rehearings or new trials are not essential to due process of law, either in judicial or administrative proceedings. One hearing before judgment, if ample, satisfies the demand of the Federal Constitution in this respect.

972 Appeal or similar review

If a full and fair trial or hearing on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a state to provide appellate review. However, if it does so provide, even an appeal and trial de novo will not cure the failure to provide a neutral and detached adjudicator required as a matter of due process. Such is the rule even in criminal cases. The right to an appeal is not a constitutional one; it is but a statutory privilege available to one who strictly complies with the statutes and rules on which the privilege is granted. Various other limitations upon appellate procedure have been held not to violate the guarantee of due process. The state may prescribe rules as to appellate procedure. But a state's denial of judicial review of the size of punitive damage awards, pursuant to a state constitutional provision which prohibits review of a fact tried by a jury unless a court can affirmatively say that there is no evidence to support the verdict, violates the Due Process Clause of the Fourteenth Amendment. And no violation of constitutional law is involved in a court's insistence that a statutory right of appeal be exercised according to the lawful rules of the court.

A state has been permitted to dismiss an appeal when the party failed to abide by reasonable orders of the courts, such as a demand that out-of-state property be delivered to a court-appointed receiver so as not to jeopardize a money judgment for the prevailing party. And it does not violate due process of law for a state court to dismiss, pursuant to statute, an appeal of an escaped prisoner and then refuse to reinstate the appeal upon his later recapture.

Appeals may be granted without violating the due process guarantee. No constitutional provision is infringed by a statute giving a further appeal from a judgment in a given tribunal which would otherwise be final. An appeal may, of course, be waived.

973 Constitutional provision, generally

Modern interpretation of constitutional provisions has seen the gradual growth of an important development affecting the power of states over foreign rights sought to be enforced within their borders. Under the decisions of the Supreme Court of the United States, the freedom exercised under the ancient doctrine of comity, in the sense in which it prevails in conflict of laws among different nations, has been greatly curtailed as between the various states and territories of the United States. Many of the decisions limiting the ancient theories of comity have arisen under Article IV, ß 1 of the Federal Constitution, usually designated as the "Full Faith and Credit Clause." Hence, this clause has become of increasing importance in recent developments of the law, and its effect is of extreme significance in ascertaining the extent to which the courts or statutes of a forum may interpose local laws or policies upon foreign rights there asserted. Article IV, ß 1 of the United States Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Generally speaking, this clause means that one state must not reflect hostility to the statutes of a sister state or threaten the system of cooperative federalism. A federal statute provides the mode in which the public acts, records, and judicial proceedings of the states are to be authenticated, and further provides that such acts, records, and judicial proceedings, or copies thereof, so authenticated, shall have such faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the state, territory, or possession from which they are taken.

Caution: The effect of the Full Faith and Credit Clause upon the force which must be given to the judgments of another state has been judicially scrutinized almost since the ratification of the Constitution. Almost all of the cases which involve the effect of this clause of the Constitution relate to the judicial acts of another state. Such matters, involving as they do the status and conclusiveness of judgments, are properly considered in another title and are not dealt with herein. This constitutional provision is considered at this point to the extent that it is concerned with public acts and records, its application to the public acts of states being one of the important developments in the field of constitutional construction.

974 Interpretation of provision
The constitutional requirement as to full faith and credit must be interpreted in connection with other provisions of the Constitution. Thus, the Full Faith and Credit Clause of Article IV, ß 1 should generally be construed and considered together with ß 1 of the Fourteenth Amendment. Hence, no state can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if such proceedings are themselves wanting in the due process of law demanded by the fundamental law.

Observation: The Full Faith and Credit Clause has been construed as not constituting a limitation upon the bankruptcy powers of Congress. However, a statute (28 USCA ß 1738) requiring that federal courts give full faith and credit to the acts, records, and judicial proceedings of any state, territory, or possession applies to bankruptcy courts, and absent fraud in the procurement of a default judgment, bankruptcy proceedings may not be used to relitigate issues already resolved in a court of competent jurisdiction.
975 Operation and effect of provision; generally
The Full Faith and Credit Clause, which has been described as a nationally unifying force, prescribes a rule by which courts, federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a state other than that in which the court is sitting.

The purpose of the full faith and credit provision is to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others, absent a showing of fraud, lack of due process, or lack of jurisdiction. Thus, the Full Faith and Credit Clause requires each state to give effect to the official acts of other states. A judgment entered in one state must be respected in another, provided that the first state had jurisdiction over the parties and the subject matter. The Full Faith and Credit Clause imposes an obligation on each state to enforce the rights and duties validly created under the laws of other states. To constitute a violation of the Full Faith and Credit Clause, it is not enough that a state court misconstrue the law of another state; rather, the misconstruction must contradict the law of the other state that is clearly established and that has been brought to the court's attention.

Federal courts are bound equally with state courts to observe the command of the Full Faith and Credit Clause where it is applicable.

Full faith and credit is required by the Constitution only with respect to those public acts which are within the legislative jurisdiction of the enacting state. Acts of state legislatures depend for their enforcement on a combination of state policy, comity, the Full Faith and Credit Clause, and the Due Process Clause of the Fourteenth Amendment.
976 Attempts to evade applicability of full faith and credit clause
The Full Faith and Credit Clause, like other appropriate provisions of the Federal Constitution, limits the power of a state to determine the confines of the jurisdiction of its courts and the character of the controversies which shall be heard therein. A state cannot escape its constitutional obligations under the clause by the simple device of denying jurisdiction to courts otherwise competent. And a state may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the Full Faith and Credit Clause, where its courts have general jurisdiction of the subject matter and the parties.
977 Applicability to territories and Indian nations
By virtue of the act of Congress which gives force and effect to the Full Faith and Credit Clause, which act is in accordance with the mandates of Article IV, ß 1 of the Constitution, the command of the clause is made applicable to the public acts, records, and judicial proceedings of territories as well as states. Therefore, the Full Faith and Credit Clause is made applicable to territorial statutes with the same force and effect with which it applies to statutes of the various states. Thus, this clause applies to the District of Columbia.

There appears to be a difference of opinion as to whether an Indian tribe or nation is a "territory" whose laws are entitled to full faith and credit.
978 Statutes and constitutions as "public acts"
It is well settled that a statute is a "public act" within the meaning of Article IV, ß 1 of the Federal Constitution. If a court of one state refuses to enforce the statute of another state in a case in which it ought to do so and in which the statute gives a right, it thereby denies the full faith and credit demanded by the Federal Constitution, because a statute is a public act of another state. And a statute which has the effect of refusing to permit actions against residents of the state by a nonresident to enforce a foreign statutory liability assessed under the statutes of another state violates the Full Faith and Credit Clause. A patent for land granted by a sister state is a public act to which every other state is bound to give

full faith and credit under the United States Constitution, so that the validity of the patent cannot be collaterally drawn into question by the courts of any other state. Moreover, the Full Faith and Credit Clause is operative not merely with respect to the public acts of a sister state, but also with respect to the "attributes" thereof. But the clause does not require a greater effect to be given to a state statute in other states than is given to it by the courts of the enacting state.

The duty imposed upon the courts to give full faith and credit to the constitution of a state as a public act of the state is as obligatory as is the similar duty with respect to the judicial proceedings of such a state.

979 Application of provision to federal statutes

While the Full Faith and Credit Clause of the Constitution has been held not to apply to a federal statute, so that a state is not required to enforce a federal statute, the Supremacy Clause of the Constitution has the effect of making such statutes enforceable. Nevertheless, there is some authority to the effect that neither Congress nor the United States Supreme Court has power, under the Full Faith and Credit Clause, to take from a state forum the right to decide, according to its own standards, whether a federal statute is a penal law unenforceable within its jurisdiction, since Article IV, ß 1 applies only to sister states.

980 Exceptions to provision; generally

Some important exceptions contravene the letter of the constitutional provision as to full faith and credit and are permitted to do so, but only because they are deemed not to be within its spirit. Subject to the restraint and limitations of the Federal Constitution, the states have all the sovereign powers of independent nations. These limitations were imposed for the accomplishment of certain purposes; and in order to preserve harmony in the constitutional system, the limitations upon the powers of the states are themselves limited to a certain extent, or rather, certain things are deemed not to be within them. Local sovereignty over local questions and the requirement that each state give full faith and credit to the public acts, records, and judicial proceedings of every other state seem to have had for their purpose not the attainment of uniformity in laws, but rather the right of each state to have local and peculiar laws which all others should respect and enforce within certain limitations; and to enable it to make and enforce such laws as it desires, each state is permitted to retain such limited sovereign power.

981 Applicability of exceptions to specific statutory provisions or public acts

Some questions have arisen as to what types of statutes or actions are subject to the Full Faith and Credit Clause. Actions or determinations of a state's governor that he or she has jurisdiction to grant asylum to fugitives are not entitled to full faith and credit. The acts of certain state commissions are not entitled to full faith and credit.

Statutes of limitations and savings statutes are not sufficiently substantive to require that full faith and credit be applicable to them.

The Full Faith and Credit Clause has nothing to do with the conduct of individuals or corporations, and has no application to the laws of a foreign country.

The Full Faith and Credit Clause does not reach the question of what effect federal entities must give to state pardons. The state interest's in having the pardon of a Federal Government officer given full faith and credit in a federal employment decision, even when combined with the federal interest in the enforcement of the statutory full faith and credit provision, is clearly outweighed by the federal interest in maintaining discretion in making its employment decisions. To hold otherwise would be to limit unwisely the power of the Federal Government in its role as employer. It is also a well-recognized rule that the courts of one state will not execute the criminal or penal laws of another state, for such laws are deemed to be strictly local and distinguishable from obligations under foreign statutes of a purely contractual, rather than penal, nature. The system of rules that a state court adopts to govern admission to the bar as a matter of local policy and assessments made by the courts of other states regarding the petitioner's legal training need not be extended full faith and credit. The Constitution does not require that full faith and credit be given to a defendant's driver's license issued by another state, and possession of that driver's license does not entitle the defendant to drive upon another state's highways when his or her driving privilege has been revoked in the other state.

982 Public policy of forum state

As a general principle, local policy may not override the constitutional requirement of full faith and credit. Thus, a judgment of one state is entitled to full faith and credit in other states. Still, there is room for some play of conflicting state policies in the effect and operation of the Full Faith and Credit Clause, although such room is narrow.

It has thus often been recognized by the United State Supreme Court, as the most significant exception to the Full Faith and Credit Clause, that there are some limitations upon the extent to which a state will be required by that clause to en-

force the judgments or acts of another state in contravention of its own statutes or policy. Therefore, the Full Faith and Credit Clause does not ordinarily require a state, with respect to persons and events within its borders, to substitute for its own law the conflicting law of another state, even though the latter law is of controlling force in the courts of the latter state with respect to the same persons and events. The Supreme Court has said that the Full Faith and Credit Clause cannot be resorted to as a means to compel a state to substitute the statutes of other states for its own statutes dealing with subject matter concerning which it is competent to legislate, especially in cases where application of the clause would create an impasse which would leave a litigant remediless.

Where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is even more apparent than in a case of the enforcement of foreign judgments. A rigid and literal enforcement of the clause, without regard to the statutes of the forum, would lead to the absurd result that wherever a conflict arises, the statute of each state must be enforced in the courts of another, but cannot be enforced in its own courts. Unless by force of that clause a greater effect is thus to be given to a state statute abroad than the clause permits it to have at home, it is unavoidable that the Supreme Court must determine for itself the extent to which a statute of one state may qualify or deny rights asserted under the statute of another. Hence, the Full Faith and Credit Clause does not require the enforcement of every right conferred by a statute of another state, and, a fortiori, it does not require the enforcement of a foreign statutory right where such enforcement would involve intrusion by the court of the forum into the public affairs of another state.

Nothing in the Federal Constitution ensures unlimited extraterritorial recognition of all statutes or of any statute under all circumstances. On the other hand, the Full Faith and Credit Clause does compel each state to recognize and respect certain rights acquired by private individuals under the laws of other states, even though such laws may differ from its own and vary from its policy.

983 Determination of which state's public policy prevails

Prima facie, every state is entitled to enforce in its own courts its own statutes, lawfully enacted, and one who challenges a state's right to do so, because of the force given to a conflicting statute of another state by the Full Faith and Credit Clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. It follows, then: that not every statute of another state will override a conflicting statute of the forum by virtue of the Full Faith and Credit Clause; that the statute of a state may sometimes override the conflicting statute of another, both at home and abroad; and again, that the two conflicting statutes may each prevail over the other at home, though given no extraterritorial effect in the state of the other.

The test or controlling principle is that the interests of the forum and the other state must be weighed and balanced. If there exists in the state of the forum a statute or a public policy, and the governmental interests of that state in the persons, property, or events in the state involved in the litigation outweighs the governmental interests of the foreign state for whose statute recognition is sought, the refusal of the courts of the forum to give effect to the right under the foreign statute does not constitute a denial of full faith and credit to that statute. The clause does not require a state to subordinate its own compensation policies to those of another state. On the other hand, if the governmental interest of the state of the forum in the subject of the litigation is lacking or slight as compared with the governmental interest of the state for whose statute recognition is sought, the refusal of the courts of the forum to accord that recognition is a denial of full faith and credit. Where the governmental interests of the two jurisdictions are equally balanced, and the statute of each properly extends over the event or transaction because of the connection with that state of one or more of the elements of the event or transaction, the forum may give effect to its own statute although in conflict with the statute of the other state in which some of the other elements of the transaction are located, and the latter state in turn may do likewise if the action is brought in its courts.

In determining whether the statute of a state under which foreign rights arose or the law of the forum should control in matters involving policy and conflicting interests, the rule is fairly well settled that different considerations usually apply where the statute creating a foreign right, which it is claimed should be given effect, is set up by way of defense to an asserted liability, from those where merely affirmative rights are claimed under a foreign statute. Upon several occasions the Supreme Court has held, that under the Full Faith and Credit Clause, one state cannot refuse to give effect to a substantive defense arising under applicable statutes of another state, if failure to sanction the defense thus created by the statute of such other state subjects the defendant to irremediable liability. The Supreme Court has pointed out, however, that the necessity of balancing the interests of the forum and of the foreign state, the statute of which is asserted to control is not any the less whether the statute and policy of the forum are set up as a defense to a suit brought under a

foreign statute or a foreign statute, is set up as a defense to a suit or proceeding under the local statute. In either case the conflict is the same. In each, rights claimed under one statute prevail only by denying effect to the other. In both, the conflict is to be resolved not by giving automatic effect to the Full Faith and Credit Clause, compelling the courts of each state to subordinate its statutes to those of the other, but by appraising the governmental interests of each jurisdiction and turning the scale of decision according to their weight.

984 Application of provision to particular public acts and statutes

As might be expected, the Full Faith and Credit Clause has been invoked (sometimes successfully, and sometimes not) with respect to a wide variety of foreign statutes, including, among others, statutes pertaining to --

-- adoption of children.

-- alimony.

-- antitrust laws.

-- arbitration.

-- breach of warranty.

-- child custody and support.

-- contracts.

-- corporate liquidations.

-- corporate officers' and directors' personal liability for debts or contracts.

-- corporate stockholders' liabilities.

-- creation and dissolution of corporations.

-- damages.

-- extradition.

-- evidence.

-- fraud.

-- garnishment.

-- immigration.

-- insurance, including statutes authorizing direct actions against insurers and statutes relating to mutual fraternal benefit societies.

-- interest rates and usury.

-- legitimacy of offspring.

-- marriage and divorce, including marriage subsequent to divorce.

-- medical malpractice.

-- pardons for crimes.

-- personal injury actions.

-- property.

-- real estate transactions.

-- receivership.

-- taxation.

-- torts generally.

-- wills and probate.

-- workers' compensation.

-- wrongful death.

985 When federal question arises under provision

A question arising under the Full Faith and Credit Clause is a federal question, and the Supreme Court of the United States is the final arbiter, for both state and federal courts, when any question is raised as to what is a permissible limitation on such clause. But in order to create a reviewable federal question under the constitutional provision as to full faith and credit, the fact that the validity of the laws of another state is drawn into question by the courts of a state determining rights arising under such laws of such other state, and not merely the construction of such laws, must be shown. Stated another way, full faith and credit are not denied to a statute of another state where a court does not deny its validity, but only construes it. The requirement of full faith and credit permits a court of one state to construe the statutes of another state when the court is called upon to give such statutes the sanction of its process. And a mere error of construction in a candid effort to construe the laws of another state is not a denial of full faith and credit.

The Full Faith and Credit Clause does not require the courts of one state to follow the construction given by the courts of another state to its statutes, particularly where such construction would render the statute unconstitutional. On the other hand, in an action on a bond given pursuant to a foreign statute, that statute, as construed by the highest court of the state in which it was enacted, must be accorded the full faith and credit which is required by the Federal Constitution in respect of the public acts of a sister state.

24 Am Jur 2d District of Columbia Summary

District of Columbia Summary

Scope:

This article discusses the government of the District of Columbia, its basis, nature, and attributes; the general method of organization and operation of the District, including the executive, legislative, and judicial branches of government, and liability of the District of Columbia in tort.

Federal Aspects:

This article discusses the federal constitutional provision (US Const, Art. I ß 1, cl. 17) under which the District of Columbia was created and from which Congress derives its authority over the District. Also discussed are miscellaneous federal statutes relating to the creation of, authority of Congress over, and the administration and liability of the District of Columbia. Additionally, the District of Columbia Financial Responsibility and Management Assistance Act of 1995 (P.L. 104-8), an uncodified federal statute providing for various aspects of budgeting and financial affairs of the District is discussed.

1 Generally; constitutional basis of government

The District of Columbia exists by virtue of a provision of the Constitution of the United States, providing that the Congress shall have power to exercise exclusive legislation in all cases whatsoever over such district (not exceeding 10 miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of the government of the United States. The word "exclusive," was used to eliminate any possibility that the legislative power of Congress over the District was to be concurrent with that of the ceding states and not to suggest that the power to exercise such exclusive legislation is nondelegable.

Observation: It has been said that the necessity of complete jurisdiction over the place which should be selected as the seat of government was obvious to the framers of the Constitution.

2 Territorial boundaries

In furtherance of the constitutional design, Maryland and Virginia each ceded a block of their respective territories lying on the Potomac River to the Congress and government of the United States, which were accepted by Congress, the boundaries of the District being established by presidential proclamation of March 30, 1791. Subsequently, that portion of the District which had been acquired from Virginia was returned to that state by an act of retrocession of Congress.

A 1945 Act relating to the boundary line between the District of Columbia and the Commonwealth of Virginia established a "new" boundary line with all the land on the Virginia side of the Potomac River, lying between boundaries set forth in the Act and mean high water mark as it existed on January 24, 1791 being located within the Commonwealth of Virginia, regardless of which state, Maryland or Virginia, the land was located in prior to 1791. This change had no effect on the title to land lying between the 1945 boundary line and the 1791 boundary line; thus, land lying east of the

1791 line and titled in United States and arguably in the District of Columbia was still titled in the United States, notwithstanding that it may have been west of the 1945 line and was clearly not within the Commonwealth of Virginia.

The District of Columbia is that portion of the territory of the United States ceded by the state of Maryland for the permanent seat of government of the United States, including the Potomac River in its course through the District, and the islands therein. All of the territory constituting the permanent seat of the government of the United States will continue to be designated as the District of Columbia.

3 Applicability of federal and state laws to District

The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force in the District of Columbia on March 3, 1901, are to remain in force except insofar as they may be inconsistent with or are replaced by some provision of the District of Columbia Code of 1901.

The District of Columbia is considered as a state for purposes of actions under specific federal statutes relating to civil rights, and any act of Congress that is applicable exclusively to the District is considered to be a statute of the District. A claim under District of Columbia law does not "arise under federal law" and provide federal court jurisdiction simply because District law incorporates federal law.

Congress has adopted the Uniform Commercial Code for the District of Columbia.

4 Generally

The Federal Constitution invests Congress with authority to exercise exclusive legislation in all cases whatsoever over such district as may, by cession of particular states and the acceptance of Congress, become the seat of the government of the United States. Under the constitutional provision, Congress is given full or plenary power to legislate for the District of Columbia. The scope of congressional power over the District of Columbia is expansive. If Congress chose, it could govern the District of Columbia directly, without the help of the municipal government or its agencies. The Constitutional guarantee of a republican form of government in every state applies to states and does not restrict the power of Congress to legislate for the District of Columbia. By force of the constitutional grant, Congress possesses the combined powers of a general and a state government in all cases where legislation for the District is possible.

Illustration: Congress was authorized by the United States Constitution to enact a section of the Washington Metropolitan Area Transit Authority (WMATA) compact that limits jurisdiction over actions against the WMATA to federal courts and courts of Maryland and Virginia.

Congress' plenary power over the District of Columbia means no more than that Congress is akin to a state legislature, and not that the government thereof is not legislative in character. The power of Congress over the District relates to all the powers of legislation which may be exercised by a state in dealing with its affairs. When it legislates for the District of Columbia, Congress acts as a legislature of national character, exercising complete legislative control as contrasted with the limited power of a state legislature on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other. When Congress passes legislation for the District of Columbia under the power expressly delegated to it by the Constitution to exercise exclusive legislation in all cases over the District, it acts in like manner as the legislature of a state and may choose to exercise only part of its powers and limit itself to those powers which would be available to a state legislature or it may exercise within the District the general legislative powers delegated to it by the Constitution.

Congress may adopt one rule of substantive criminal law for the District while promulgating a different one for the general federal system.

Congress also has the power to levy and collect taxes in the District of Columbia.

5 Police power

Since the legislative powers of Congress over the District of Columbia are unlimited, the power of Congress to enact regulations affecting the public peace, morals, safety, health, or comfort within the District of Columbia is the same as that a state legislature or a municipal government would have in legislating for state or local purposes. The police power of Congress in the District of Columbia is substantially the same under the Fifth Amendment as that which may be exercised by the states under the limitations of the Fourteenth Amendment. Although the police power fundamentally belongs to the states and not to the federal government, the right to exercise it for the general good is an inherent attribute

of sovereignty, with the result that Congress could exercise the police power with respect to matters local to the District of Columbia. Accordingly, Congress' exercise of the police power in legislating for the District has been upheld by the courts in various specific instances, including the enactment of legislation to police drug activity in the District of Columbia, the enactment of the District of Columbia Redevelopment Act of 1945, the regulation of life insurance contracts, and the enactment of legislation prohibiting and penalizing combinations for the purpose of fixing prices for services.

6 Delegation of powers

The exclusive legislative power of Congress with respect to the District of Columbia may be delegated to the District itself, subject to the constitutional limitations to which all lawmaking is subservient and subject also to the power of Congress at any time to revise, alter, or revoke the authority granted. Congress may also delegate all or part of its plenary legislative power over the District of Columbia to other bodies, and may make such allocations of power among those bodies as it deems appropriate. The District of Columbia Court Reform Act and Home Rule Act did not repeal by implication former statutes delegating power to federal agencies where the congressional delegation of power was of long standing and consistent with the express provisions of both Acts.

Illustration: Congress, by enactment of a statute creating the District of Columbia Financial Responsibility and Management Assistance Authority and amendments thereto, delegated its plenary power to run the schools of the District of Columbia to the Authority.

The District of Columbia Self-Government Act does not bind Congress to the Contract Clause for congressional legislation for the District of Columbia despite delegation of legislative authority to local officials. The Act expressly recognizes congressional authority to exempt congressional legislation for the District of Columbia from any contract clause limitation.

7 Pre-emption

Neither the District of Columbia Council nor its electors can overrule acts of Congress. The District is not authorized to repeal legislation national in scope, notwithstanding that the repeal would affect enforcement of legislation only within the District's jurisdiction.

Illustration: A District of Columbia Mental Health Information Act dealing with mental health records was pre-empted by a federal veteran's record statute comprehensively regulating the disclosure of veteran's records, as was a District of Columbia law controlling the release to insurance carriers of sensitive patient information which would require carriers to disobey federal regulations. Similarly, a District of Columbia scheme of regulation establishing level of care distinctions in the licensing and regulation of nursing facilities was pre-empted by a federal scheme establishing a single standard of care. A federal act pre-empted a District of Columbia Act providing alternatives to traditional punishment of addicts where the federal and District statutes defined the class of eligible addicts differently. A District of Columbia Code provision stating that a borrower making more than a 20 percent down payment cannot be required to make escrow payments of real estate taxes or casualty insurance was pre-empted by a directly contrary federal statute dealing with federal savings and loan associations. The pre-emption provision of Petroleum Marketing Practices Act pre-empted only those provisions of the District of Columbia Retail Service Station Act which addressed termination, nonrenewal, or notice required with respect to those practices.

8 Generally; as municipal corporation

The District of Columbia is a distinctive and unique governmental unit. It has been declared by Congress to be a body corporate with all the powers of a municipal corporation, yet the District is not strictly a local municipal authority because of its peculiar status as the seat of the national government.

Illustration: Although the District Court for the District of Columbia has held that the United States park police has concurrent jurisdiction with the metropolitan police department within the District of Columbia, and thus the park police is authorized to operate in the District of Columbia outside of the parks themselves, the District of Columbia Court of Appeals has disagreed and held that Park Police lack statutory authority to be issued search warrants.

The United States, as a sovereign power, is entirely separate and distinct from the District of Columbia as a municipal corporation. The District of Columbia is not an agency or instrumentality of the United States, and the United States Government is not liable for the obligations of the District of Columbia as a municipal corporation unless Congress has otherwise provided. The District of Columbia, in turn, is a municipal corporation, and not a department of the federal government, as such, the District may not, for example, rely on federal limitation of action statutes.

The District of Columbia, as a municipal corporation, is exempt from garnishment proceedings to collect a judgment owed by one of its employees.

9 As state or territory

While the District of Columbia is not a state, the District exercises many governmental functions commonly performed by states.

Although subject to complete control by Congress, in many respects the District is an entity separate and apart from the general federal system, the powers of Congress over the District being in the nature of those of a state legislature. When Congress acts as a local legislature for the District of Columbia and enacts legislation applicable only to the District of Columbia and tailored to meet specifically local needs, its enactments should, absent evidence of contrary congressional intent, be treated as local law, interacting with federal law as would laws of the several states. However, the laws enacted by Congress as special legislation applicable only to the District are not the general laws of the United States.

For some purposes, the District of Columbia is classified as a state. Thus, it is deemed to be a state within the meaning of certain treaties and acts of Congress. The District of Columbia can also be viewed as a state for the limited purpose such as creating an interstate agency. The extent to which the District of Columbia's rights and responsibilities as defined under a particular statute resemble those of a state must be determined by ascertaining congressional intent on a case-by-case basis.

Judgments rendered by courts of the District of Columbia are entitled to full faith and credit in the courts of the several states, and, conversely, District of Columbia courts must accord full faith and credit to judgments rendered by state courts. The District of Columbia has also been referred to as a territory.

10 Effect on rights of citizens

A citizen of the District of Columbia is not a citizen of a state. For many years citizens of the District of Columbia had no voice in the election of the president and vice-president of the United States; by constitutional amendment, however, the District now chooses electors of these offices in the same manner and to the same number as if the District were a state, but not more than the least populous state.

The District of Columbia is not a state within the intendment of the constitutional provision conferring jurisdiction upon the federal courts in cases of diversity of citizenship. However, by virtue of an act of Congress, the diversity jurisdiction of the federal courts has been extended to citizens of the District of Columbia.

11 Generally

Subject to retention by Congress of the ultimate legislative authority over the nation's capital granted by the Federal Constitution, the District of Columbia Self Government and Governmental Reorganization Act provides that the intent of Congress is to: delegate certain legislative powers to the government of the District of Columbia; authorize election of certain local officials by the registered qualified electors in the District; grant to the inhabitants of the District powers of local self-government; modernize, reorganize, and otherwise improve the governmental structure of the District; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters. Congress also intends to implement certain recommendations of the Commission on the Organization of the Government of the District of Columbia and take certain other actions without respect to whether the charter for greater self-government provided for in the code is accepted or rejected by the electors of the District.

Observation: In structuring the government of the District of Columbia, Congress is not bound by the separation of powers limitations that control its powers at the national level.

12 Designated powers

The District of Columbia has been declared to be a body corporate for municipal purposes, which may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of the District of Columbia Code. The District is responsible for all the duties, obligations, responsibilities, and liabilities, and vested with all the powers, rights, privileges, immunities, and assets, respectively, that are imposed upon and vested in the corporation, as created, or the mayor. The District of Columbia, as sovereign, has the inherent right to control the exercise of police powers within its territory.

Reminder: Neither the District of Columbia Council nor its electors can overrule acts of Congress.

13 Council

The District of Columbia Code provides for the creation of a council for the District and for election of the members thereof by the qualified electors of the District. The Code provides for the qualifications of members of the council for holding office

Illustration: A candidate for a council seat remained a resident of the District, as required to establish eligibility to hold public office, during his period of incarceration in Virginia and Pennsylvania, since he never expressed any intent not to return to the District, and he did indeed return upon his release from prison. Lawrence v. District of Columbia Bd. of Elections & Ethics, 611 A.2d 529 (D.C. 1992). and for their compensation.

The legislative authority and the powers of the council are specified in detail in the code. The District of Columbia Council's interpretation of its responsibilities under the Home Rule Act is entitled to great deference. The authority of the District of Columbia Council is subject to certain general provisions with respect to Congressional authority and to other specific restrictions contained in the code.

Members of the Council are legislators in every traditional sense and, as such, they enjoy broad First Amendment protections in discharging their responsibilities. Thus, under a District of Columbia statute, council members enjoy legislative immunity and may not be questioned in any other place for any speech or debate made in the course of their legislative duties.

Illustration: Members of the District of Columbia city council have a constitutionally protected right to cast unimpeded votes on matters of public importance and thus could not be enjoined from introducing bills that would have abolished the District Lottery & Charitable Games Control Board and were immunized from claims for damages arising from the introduction of these two bills.

However, the District's local speech or debate statute provides no broader protection than speech or debate clause of Federal Constitution.

The Council of the District of Columbia has the power to investigate any matter relating to the affairs of the district and for such purpose may require the attendance and testimony of witnesses and production of books, papers, and other evidence.

The Council of the District of Columbia has authority to repeal, or to amend in more than technical fashion, laws adopted through initiative process.

14 Mayor

The District of Columbia Code creates the office of mayor of the District of Columbia and makes provision for matters relating to election to, qualification for, and compensation payable for such office. The code further specifies the powers and duties of the mayor, with specific reference to matters such as submission of statements of impact of proposed acts and municipal planning. Under the Comprehensive Merit Personnel Act, the mayor is the personnel authority for the Commission.

15 Neighborhood commissions

The District of Columbia Code provides for the division of the District into a number of neighborhood commission areas, the several commissions being given advisory authority as to matters specified. The authority and responsibilities of such commissions are specified in detail in the code.

District of Columbia advisory neighborhood commissions are not entitled to statutory special notice of an adjudicative proceeding unless the proceeding concerns matter specifically listed in the statute governing such notice. However, statutory notice to District of Columbia advisory neighborhood commissions (ANC) is required for proposed governmental decisions affecting neighborhood planning and development, as specified in ANC statutes.

The District of Columbia Board of Elections and Ethics is authorized to adopt, amend, repeal, and enforce all regulations necessary to carry out the provisions of the code with respect to neighborhood commissions and is further directed to take such steps as are necessary to ensure that the election of members of such commissions provided for is held in an efficient manner.

16 Financial Responsibility and Management Assistance Authority

Congress enacted the District of Columbia Financial Responsibility and Management Assistance Act of 1995 to eliminate budget deficits and cash shortages of the District of Columbia, as well as, inter alia, to ensure the most efficient and

effective delivery of services by the District government. Pursuant to the Act, the District of Columbia Financial Responsibility and Management Assistance Authority was created.

For each fiscal year for which the District government is in a control period, the mayor must develop and submit it to the Authority a financial plan and budget for the District of Columbia subject to specified standards, which must be reviewed by the Authority, and either be approved or disapproved. Additionally, Acts passed by the District government must be submitted to and reviewed by the Authority. The Authority may also restrict borrowing.

Generally, the annual federal payment to the District of Columbia must be made into an escrow account held by the Authority which must allocate funds to the mayor. The mayor must submit reports to the Authority on actual revenues and expenditures and any variances with the financial plan must be certified to various authorities and the Authority may withhold funds from the District government. The Authority may also submit recommendations to the District government regarding management of District affairs.

The Authority may issue bonds, notes or other obligations to obtain funds for the use of the District government, may pledge or grant a security interest in revenues to purchasers of any issued bonds, notes or other obligations, and must establish a debt reserve fund.

Congress, by enactment of statute creating District of Columbia Financial Responsibility and Management Assistance Authority and amendments thereto, delegated its plenary power to run schools of District of Columbia to Authority.

17 Generally

The Constitution of the United States gives Congress power to exercise exclusive legislation in all cases whatsoever over the District of Columbia. In the exercise of this plenary power, Congress has established a judicial system in the District by vesting the judicial power in three federal and two District of Columbia courts. The federal courts so vested are the Supreme Court of the United States, the United States Court of Appeals for the District of Columbia Circuit, and the United States District Court for the District of Columbia. The District of Columbia courts so vested are the District of Columbia Court of Appeals[n30] and the Superior Court of the District of Columbia.

18 Nature and character of courts

The courts created by Congress for the District of Columbia are permanent establishments, and are constitutional courts of the United States, being ordained and established under Article III of the Constitution.

Courts of the District of Columbia are considered federal courts to the extent that they may take judicial notice of the laws of all the states.

Illustration: The courts of the District of Columbia in an action to recover damages for a negligent act committed in that jurisdiction causing death in another state, which action is based upon the statutes in such case made and provided, took judicial notice of the statutes of such state.

19 Jurisdiction and powers of courts

Subject to the constitutional guarantees of personal liberty, Congress may vest in the courts of the District of Columbia a variety of jurisdiction and powers. The Congress may clothe such courts not only with the jurisdiction and powers of federal courts in the several states, but with such authority as a state may confer on her courts. It may confer upon them jurisdiction over nonfederal causes of action, or over quasijudicial or administrative matters. And congressional enactments have been sustained which conferred powers on the courts of the District of an exceptional and advisory character. However, jurisdiction conferred by Congress on courts of the District of Columbia is limited by the express terms of the act conferring it.

A party asserting a right under the Constitution of the United States or federal laws may lay venue under either the general federal venue statutes or the special District of Columbia statutes, and the courts of the District may exercise their authority in cases committed to them by either.

20 Judges

The judges of the courts of the District of Columbia system are of equal rank and power with those of other inferior courts of the federal system and hold their offices during good behavior. Their compensation cannot, under the Constitution, be diminished during their continuance in office. The provisions of the Federal Constitution vesting the judicial power of the United States in the Supreme Court and such inferior courts as Congress may establish, with judges having tenure during good behavior and protection against salary reduction, have been held not to require that prosecution for felonies committed in the District of Columbia be presided over by a judge having the tenure and salary protections

provided therein. The courts of the District of Columbia, no less than other federal courts, may constitutionally impose only such punishment as Congress has seen fit to authorize, even though the courts of the District of Columbia were created by Congress pursuant to its plenary power under the Federal Constitution to legislate for the District (US Const. Art. I ß 8 cl. 17) and are not affected by the salary and tenure provisions of Article III of the Constitution.

21 Superior Court of the District of Columbia and divisions thereof

The District of Columbia Court of General Sessions, the Juvenile Court of the District of Columbia, and the District of Columbia Tax Court were consolidated in a single court known as the Superior Court of the District of Columbia.

The Superior Court of District of Columbia is a court of general jurisdiction, and has the power to adjudicate actions at law or in equity within its jurisdiction. Though each individual division of superior court is entrusted with specific responsibility, must follow pertinent statutory mandates, and must transfer inappropriate cases to proper division, where a claim is related to subject matter within responsibility of division, that division may rely upon its general equity powers to adjudicate a claim and to award relief.

Except for certain matters begun in specified courts within a designated time of the effective date of the reorganization act, the Superior Court has jurisdiction of any civil action or other matter brought in the District of Columbia and over criminal offenses except as otherwise specified. Unless the legislature has divested the superior court of jurisdiction over particular subject matter though enactment of legislation, a court has general jurisdiction over common-law claims for relief.

Illustration: The District of Columbia court had subject matter jurisdiction over a premises liability action even though the action was between Virginia residents and arose from an incident which occurred in Virginia, as the action was not one in which jurisdiction was vested exclusively in a federal court.

The Family Division of the Superior Court has exclusive jurisdiction of actions concerning divorce, revocation of divorce, support, custody, annulment, adjudication of property rights in such actions, adoption, child delinquency, and certain other proceedings.

The Tax Division of the Superior Court has exclusive jurisdiction of all appeals from and petitions for review of assessments of tax, and civil penalties thereon, made by the District of Columbia, and all proceedings brought by the District for the imposition of criminal penalties pursuant to the code provisions relating to taxes levied by or in its behalf.

The Small Claims and Conciliation Branch of the Civil Division in the Superior Court has exclusive jurisdiction of small claims for the recovery of money, if the amount in controversy does not exceed the statutory sum, exclusive of interest, attorney fees, protest fees, and costs.

The All Writs Act provides the superior court with jurisdictional authority, albeit in rare circumstances, to issue emergency relief pending resolution of agency proceedings.

Illustration: The superior court had jurisdiction to review the Contract Appeals Board's (CAB) decisions in a bid protest, and thus, the superior court also possessed power under the All Writs Act to issue temporary relief to a disappointed bidder, even though the CAB had not yet issued a decision. District of Columbia v. Group Ins. Admin., 633 A.2d 2 (D.C. 1993).

22 District of Columbia Court of Appeals

The District of Columbia Court of Appeals has jurisdiction of appeals from all final orders and judgments of the Superior Court of the District of Columbia and certain orders or rulings of the Superior Court appealed by the United States or the District of Columbia. Such appeals lie as a matter of right, except in the case of judgments of the Small Claims and Conciliation Branch of the Superior Court of the District of Columbia and of certain judgments in the criminal division of that court where the penalty imposed is a fine within specified statutory limits, in which case appeals may be allowed in the discretion of the District of Columbia Court of Appeals.

Practice guide: Notice of appeal must designate the judgment, order, or part thereof from which the appeal is taken as appeals may jurisdictionally be taken only from final judgments and orders and in litigation two or more potentially appealable orders may be entered.

To be "final" so as to entitle adversely affected party to an appeal, a court order must dispose of the whole case on the merits so that the court has nothing to do but to execute the judgment or decree already rendered. Appeals are barred

unless the order appealed from disposes of all issues in case; order must be final as to all parties, all subject matter, and all causes of action involved. An order quashing service of process and dismissing a complaint or dismissing a counterclaim without prejudice is an appealable, final order. The denial of a motion to vacate the grant of a mistrial or to limit retrial on the issue of damages or order granting a mistrial or new trial have been held not to be appealable final orders. Applications for the allowance of an appeal would be denied, where an inadequate record existed upon which the Court of Appeals presently should decide most of the issues certified by the trial court, only one of the certified issues, that of pre-emption, could arguably be said to present a controlling question of law, and that issue was open for final determination only by the United States Supreme Court as one of nationwide relevance. The Court of Appeals would not consider issues regarding lessors' claim that rent renegotiation was to be decided by arbitration, even if it had jurisdiction, as issues should not be ruled upon as pure questions of law while facts were still being disputed at the trial court level.

One panel of Court of Appeals does not have the authority to overrule another.

In promulgating rather than applying bar rules, the District of Columbia Court of Appeals acts in legislative rather than judicial capacity; thus, District Court confronted with simple challenge to validity of such rules is not reviewing state-court judicial decision, within meaning of Rooker-Feldman doctrine, and has subject matter jurisdiction.

23 Appeal of interlocutory orders

The District of Columbia Court of Appeals has jurisdiction of appeals from certain interlocutory orders of the Superior Court of the District of Columbia. Such appeals lie as a matter of right. The District of Columbia Court of Appeals has jurisdiction over certain interlocutory orders specified by statute, by court rule, and by collateral order doctrine. Interlocutory appeals may not be taken from an order that appears to be final simply because party has no alternative but to obey or be punished.

However, although it ordinarily reviews only final orders and judgments of superior court, the Court of Appeals will treat certain interlocutory orders as final and collateral, and hence appealable, when they have final and irreparable effect on important rights of parties.

In order for an interlocutory order to be treated as final and collateral and accordingly subject to appellate review, the order must conclusively determine an undisputed question, must resolve an important issue completely separate from merits of action, and must be effectively unreviewable on appeal from final judgment. To fall within the "affecting property" exception to nonappealability of nonfinal orders, an order must change the status quo between the landlord and tenant.

Illustration: A trial court's order granting a vendor possession of real property that was in the possession of the purchaser under an installment land contract was an order changing or affecting possession of property and, thus, was appealable interlocutory order.

The Court of Appeals had jurisdiction of a high school principal's interlocutory appeal from an order denying his motion for summary judgment, which was based in part on assertion of qualified immunity against student's civil rights claim, under collateral order exception to general finality requirement.

An order granting partial summary judgment was appealable pursuant to the exception for appeals from orders "changing or affecting possession of real property," where the order transferred possession of property from its owners and placed it under control of a trustee to manage, to collect rents and profits, and to sell; moreover, the order finally resolved nature and extent of each party's interest in the property.

Trial court's grant of summary judgment against the government in its suit to quiet title in property bid off to it in tax sale was properly appealed as an interlocutory order changing or affecting possession of property, even though trial court had not ruled on allegation of wrongful eviction resulting from allegedly invalid tax sale.

An order vacating a default judgment against a landlord and effectively restoring a tenant to possession of premises was appealable, interlocutory order.

24 Appeal of administrative decisions

The District of Columbia Court of Appeals has jurisdiction to review orders and decisions of certain specified administrative agencies of the District. However, the Court of Appeals has jurisdiction to review order or decision of the mayor or an agency only in a contested case. A court reviewing a record of an administrative proceeding must examine wheth-

er the agencies findings are supported by substantial evidence and if conclusions of law followed rationally from the findings or whether the action was arbitrary capricious or an abuse of discretion. The Court of Appeals may not substitute its own judgment. On appeals of Superior Court's rulings on review of administrative decisions, the Court of Appeals' scope of review is precisely the same as that which it employs in cases that come directly before the Court of Appeals.

Illustration: The Court of Appeals lacked jurisdiction to hear direct appeal from decision of Board of Elections and Ethics denying petitioner's challenge to qualifications of prospective candidate for council seat on residency grounds filed before the Board finally determined candidate's eligibility.

As with federal courts, the All Writs Act is the source of the District of Columbia Court of Appeals' authority to issue temporary relief pending administrative review in a contested case over which the court would eventually have direct reviewing authority.

25 United States District Court for the District of Columbia

The United States District Court for the District of Columbia has jurisdiction of any civil action or other matter begun in the court before the effective date of the District of Columbia Court Reorganization Act of 1970, except for certain matters within the jurisdiction of the Superior Court of the District of Columbia, and various other civil actions and matters, depending on the designated statutory periods beginning on the effective date of the reorganization act. Jurisdiction is also conferred on the United States District Court for the District of Columbia of any civil action begun in the court during the thirty-month period beginning on the effective day of the reorganization act wherein the amount in controversy exceeds that specified in the code provision; excluded from this provision, however, are actions involving matters over which the Superior Court is given specific jurisdiction under the code.

Illustration: Despite provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970, under law pertaining to federal question jurisdiction, references to laws of the United States or acts of Congress do not include laws applicable exclusively to the District of Columbia, the District Court for the District of Columbia retained full federal question subject matter jurisdiction, and had jurisdiction over a complaint raising a constitutional challenge to a local District of Columbia statute.

Caution: A later case has held that reference to law of the United States would not include provisions of the DC Code enacted by Congress. Shifrin v. Wilson, 412 F. Supp. 1282 (D.D.C. 1976). However, the District of Columbia Home Rule Act does not apply exclusively to the District of Columbia; thus, the Act could provide a basis for the exercise of federal question jurisdiction in an action brought by former employees of the United States Department of Labor who were transferred to the District of Columbia Department of Employment Services, seeking an injunction which would either reinstate them to the federal competitive service or would grant them identical rights, benefits and privileges.

In addition, the United States District Court for the District of Columbia has jurisdiction under the code of various classes of criminal offenses in addition to its jurisdiction as a United States District Court and any other jurisdiction conferred on it by law.

The Federal Rules of Civil Procedure provide that whenever the law of a state in which the District Court is held is made applicable in such rules, the law applied in the District of Columbia governs proceedings in the United States District Court for the District of Columbia. The law to be applied under this rule is not that law which is generally applicable as federal law elsewhere as well as in the District, but rather that law which is locally applicable in the District. Federal courts located in the District of Columbia will apply choice-of-law and substantive decisional rules of District of Columbia courts when appropriate although, because of the District's unique position, the Rules of Decision Act does not bind federal courts to that result, the District's law is applied out of deference to authority of the District of Columbia Court of Appeals as the highest court of the District and in order not to subvert the aims of the Erie doctrine.

The term "state" includes the District of Columbia where appropriate, and that the term "statute of the United States" includes acts of Congress locally applicable in the District of Columbia.

26 United States Court of Appeals for the District of Columbia Circuit

In addition to its jurisdiction as a United States Court of Appeals and as otherwise conferred by law, the United States Court of Appeals for the District of Columbia Circuit has jurisdiction of appeals from judgments of the District of Columbia Court of Appeals with respect to violations of criminal laws of the United States which are not applicable exclusively to the District of Columbia if a petition for allowance of an appeal from the judgment is filed within the statutory

time after entry thereof, or entered before the effective date of the District of Columbia Court Reorganization Act of 1970 in any other case if a petition for allowance of an appeal from the judgment is filed within a designated time after its entry.

Practice guide: Decisions rendered by the United States Court of Appeals for the District of Columbia Circuit prior to the effective date of the Court Reorganization Act, even if subsequently overruled by that court, would remain valid and binding case law in the District of Columbia court system until such time as they might be modified or set aside by the District of Columbia Court of Appeals.

The Court of Appeals for the District of Columbia Circuit has the power to adopt a narrowing construction of a provision enacted by Congress rather than by the District of Columbia council.

Observation: The traditional policy of the Supreme Court of the United States is to refuse to review a determination of local law of the District of Columbia by the Court of Appeals for the District of Columbia Circuit in all but exceptional cases.

27 Generally

In accordance with the rule applicable to municipal corporations generally, the District of Columbia is liable in tort for injuries caused in the exercise of a proprietary, as opposed to a governmental, function. The District of Columbia could be held liable for tortious acts of one of its employees against another, however, supervisory employees could not be held liable under theory of respondeat superior.

Illustration: The District of Columbia was liable to respond in damages, under the theory of respondeat superior, for the intentional torts of its police officers acting within the scope of their employment. However, the District of Columbia was not liable for injury and wrongful death of lifeguards employed by an independent contractor who leased a swimming pool from the District, where the District had no actual control or responsibility over the swimming pool at the time of the accident.

The District is responsible for such negligence of its employees or officers having the care of streets, avenues, and sidewalks as results in personal injuries to individuals. The neglect of district officers to keep the public ways of the city in safe condition is the neglect of the municipal corporation, although they are subject to the permanent authority of Congress; the fact that the fee simple of the streets of the City of Washington is in the United States does not affect such liability.

Observation: Public interest may often be implicated in greater measure in cases in which District of Columbia is party than in purely private litigation, and appellate courts should not be blind to such considerations.

28 Operation of motor vehicle

Under the District of Columbia Code, the defense of governmental immunity may not be asserted by the District in any suit at law against it to recover money damages for death or injury to person or property caused by the negligence of an employee of the District in the operation of a motor vehicle within the scope of his office or employment.

In the case of a claim arising out of the operation of an emergency vehicle on an emergency run, the District is liable only for gross negligence.

Illustration: No plain error or miscarriage of justice occurred when a trial court incorrectly instructed a jury that the District of Columbia could be liable on negligent supervision theory even if no representative of District was found to be grossly negligent; the District never objected to the instruction or expressed dissatisfaction with it, and, in its proposed verdict form, the District effectively invited trial court to treat negligent supervision as requiring only ordinary negligence.

29 Notice requirements

The District of Columbia Code provides that no action may be maintained against the District for unliquidated damages to person or property unless, within the time designated after the injury or damages was sustained, notice in writing is given to the commissioner (mayor) of the District with respect to the approximate time, place, cause, and circumstances of the injury or damage. Minor inaccuracies in the notice are not ordinarily fatal to the cause of action. Inquiry into the adequacy of a notice is limited to the information contained in the notice. Compliance with the notice requirement is a question of law that the Court of Appeals reviews de novo.

30 Settlement of claims

The District of Columbia Code authorizes the mayor of the District, in his discretion, to settle claims founded on torts of District employees where the District, if a private individual, would be liable prima facie to respond in damages, irrespective of whether the negligence occurred in the performance of a municipal or governmental function of the District.